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ABSTRACT

This book represents the author's third effort to bring school districts and their appropriate personnel up-to-date in volume form as to legislation, rules and regulations, statutes, (both state and federal), and the applicable interpretations based on court decisions. Selected areas of concern are discussed, and the Oklahoma Statute Citation listed, followed by the section number found in the Oklahoma School Code Book distributed by the State Department of Education. (Author/MLF)

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THE POWERS & DUTIES OF AN OKLAHOMA SCHOOL DISTRICT

by LARRY L. FRENCH

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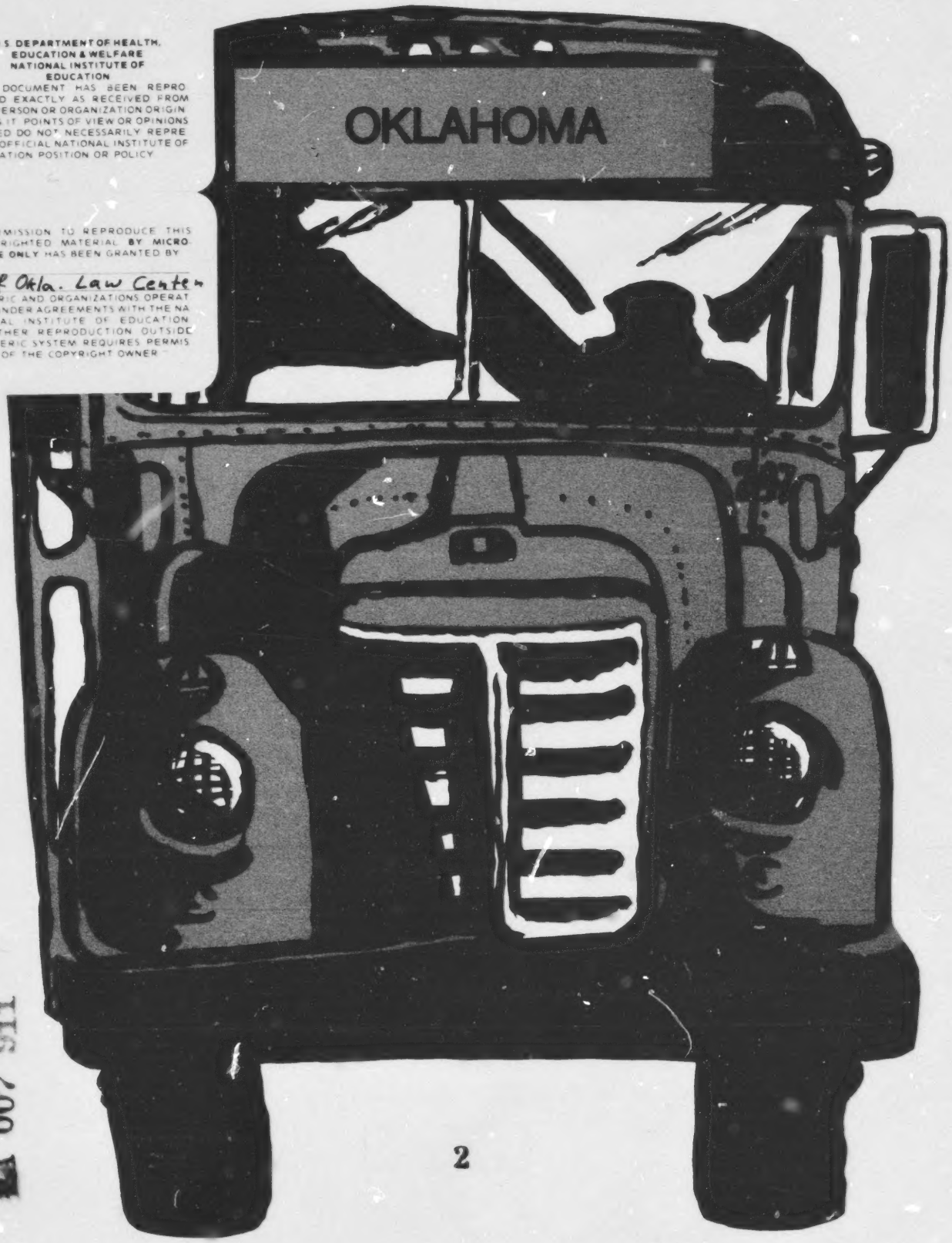

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FOREWORD

School law exists as a rapidly changing phenonemon and accordingly, difficulty abounds in attempting to set out the "essence" of the law. This book represents the author's third effort to bring school districts and their appropriate personnel up to date in volume form as to legislation, rules and regulations, statutes, both State and Federal, and the applicable interpretations based upon court decisions. Because school law is a ever rapidly changing area of the law, by the time this book is distributed, additional law will have been made. For example, the United States Supreme Court during the 1974 fall term will determine a case involving student due process and one involving an underground newspaper. Already there has been issued a Federal District Court decision holding that procedural due process principles are applicable to a "summary spanking sentence." The year 1974 has been a banner year for school litigation in the high court of the land. The Supreme Court has determined that forced maternity leave is unconstitutional and has further determined that sick leave is not applicable to maternity leave. Further, the United States Supreme Court reversed a trend of twenty years relative to integration law suits in the case involving the City of Detroit, Michigan. The trend of the high court has undoubtedly swung conservative now, but this is not tc say that school districts cannot revert to their procedures utilized five to ten years ago. New problem areas keep surfacing, such as proper rules and regulations, penalty provisions, employment contracts and negotiations to mention only a few. I have always contended that the two

most important documents a school district deals with each fiscal year are: (1) the public employee contract and (2) board minutes. Documentation generally must exist as the "rule" rather than as the "exception." The concept of "preventive litigation" of which I have urged these past four years, continues to be the premise from which we must operate. For example, the questions would not be "when are you going to get into negotiations?" But rather, "are you ready for negotiations?"

A school district today cannot afford to operate within a vacuum and/or "behind closed doors." The public demands its public servants to be accountable in every manner as to its operations and systems. "Notice" must always be a vital byword, and discussions and conferences with the various elements of education must be had. Staff resources such as accountants, attorneys and architects must be utilized on a continuing basis.

As to the content of this book, hopefully such will provide appropriate information and guidance. As to citations, I have cited the Oklahoma Statute Citation where applicable, followed in parentheses by the Section Number found in the Oklahoma School Code Book distributed by the State Department of Education. I have selected areas of concern, many of which I had touched on before in prior publications, but are in need of revision.

I very much appreciate the assistance and valued aid of my secretary, Elsie Rabiee, my editor and publisher, Dwain Schmidt and his staff - Nancy Kenderdine, Diane Davis and Patricia Slater, my law partner, Bill Edwards, and to the growing number of administrators and board members who have contributed their particular input to this endeavor.

Larry L. French
Chief Counsel
OSSBA / OASA

ABOUT THE AUTHOR.....

LARRY L. FRENCH, a former Assistant Attorney General of the State of Oklahoma in charge of education matters, is Chief Counsel and Negotiations Consultant for the Oklahoma State School Boards Association and the Oklahoma Association of School Administrators. He is also a partner in the law firm of Edwards & French with offices in Seminole and Oklahoma City, Oklahoma.

He has authored "The School Administrator's Legal Handbook" published in 1972 by the University of Oklahoma Law Center and "Oklahoma Schoolhouse Law" published in 1973 by the University of Oklahoma Law Center. He has also written numerous articles for educational and legal publications. French is a special lecturer in school law with the College of Education, Graduate Division, of the University of Oklahoma.

A graduate of the Univesity of Oklahoma College of Law, he served as President of his Law Fraternity, President of his Senior Class and President of the Law School Board of Governors and received the Student Bar Association Prize for his outstanding contribution to the College of Law and the Eugene Kuntz Award as Outstanding Senior Law Student. French is currently a member of the Seminole County, State of Oklahoma and American Bar Associations and has served as President of the Seminole County Bar Association. He was named Oklahoma's Outstanding Young Lawyer in 1972 by the Oklahoma Bar Association.

Being regarded as one of the top school law experts in the country, French represents a number of school districts across the State of Oklahoma and is a much demanded speaker, both within the State and across the country. He is a member of the National Organization of Legal Problems on Education, a member of the Council of School Attorneys of the National School Boards Association and is currently Secretary-Treasurer of the Oklahoma School Attorneys Association.

French holds the rank of Lt. Commander in the United States Naval Reserve and is currently administrative officer of the Reserve Intelligence Unit stationed in Oklahoma City, Oklahoma. He is also State Coordinator for the United States Naval Academy Information Program and a member of several naval organizations.

INTRODUCTION:

The powers and duties of a school district are now basically limited to those provided by statute. A school district has been defined as a political subdivision. As such, it is subject to the state constitution, state statutes, and the rules and regulations dictated by the State Board of Education.

As has been seen in recent years, even the doctrine of "in loco parentis" has been diminished severely on our public school campuses. The era has passed when a school district could afford to base substantial action on a claim of inherent power or upon the common law. Today, if the power isn't specifically granted by statute, the power probably doesn't exist.

Because of this trend toward limiting the school district to statutory powers, it is obviously essential that each Oklahoma school district be thoroughly familiar with the contents of the Oklahoma School Code. Title 70, Oklahoma Statutes, Section 5-117 is the specific powers and duties section of the Code. Additional powers and duties are found throughout the Oklahoma School Code. All provisions are crucial, for together they specify all the powers which a school district has.

Section 5-117 specifies approximately twenty-two powers of the school district. These are:

1. Elect officers;
2. Make rules and regulations;
3. Maintain and operate complete public school system;
4. Designate schools to be attended by children;
5. Operate cafeterias;
6. Operate thrift banks, book stores, print shops, vocational and other shops;
7. Purchase, construct or rent, operate or maintain
   (a) classrooms;
   (b) libraries;
   (c) auditoriums;
   (d) gyms;
   (e) stadiums;
   (f) recreation places/playgrounds;
   (g) administration buildings;
   (h) other school houses and school buildings;
8. Acquires sites and equipments therefor;
9. Have school property insured;
10. Acquire property by condemnation;
11. Erect buildings on leased land(prior to April 3,1969)
12. Dispose of property, sale, exchange, lease or otherwise;
13. Purchase necessary property, equipment, furniture, supplies;
14. Incur expenses;
15. Contract with and fix duties and compensation of
   (a) physicians
   (b) dentist
   (c) optometrist
   (d) nurses
   (e) attorneys
   (f) superintendents
   (g) principals
   (h) teachers
   (i) bus drivers
   (j) janitors
   (k) necessary employees
16. Pay necessary travel expenses of employees and board members;
17. Provide for employees leaves of absences without pay;
18. Exercise sole control over schools and property of district;
19. Rent per month equipment and furniture if necessary;
20. Cooperative agreements
   (a) courses of instruction for handicapped

(b) music
(c) trades and vocations
(d) driver training
(e) health
(f) visual care (this particular power is more fully set out in Title 70, O.S., Section 1-107 (7))

21. Operate school on military reservation;
22. Have a personnel policy and sick leave guide.

Additional powers so delineated within the Oklahoma School Code, but not found in Section 5-117 include:

1. Title 70 Section 1-109 (9) provides permissive authority for the utilization of five days in regard to teachers for attendance of professional meetings. Further, this same section sets out a permissive duty of maintaining school for less than a full term only when conditions beyond the control of school authorities make impossible the maintenance of said term.

2. Title 70 Oklahoma Statutes, Section 5-105 (49) is an extremely critical section in that it authorizes the body corporate and stipulates the power of the school district to contract and contract with and further, the power to sue and be sued.

3. Title 70 Oklahoma Statutes, Section 5-122 (66) provides a mandatory duty of the clerk of the board of education to keep an accurate journal of the proceedings of the board, which specifically authorizes and requires the transcribing of board minutes.

4. Title 70 Oklahoma Statutes, Section 5-123 specifically grants the power to expend monies by way of written contract and further requires that if an expenditure of $1,000.00 or more is made, it must be made pursuant to sealed proposals and granted to the lowest responsible bidder.

5. Title 70 Oklahoma Statutes, Section 5-129 authorizes the establishment of a student activity fund.

6. Title 70 Oklahoma Statutes, Section 5-130 (74)

gives a board of education, pursuant to its regulations and conditions, the power to open any school building and permit the use of any property belonging to the district for religious, political, literary, cultural, scientific, mechanical or agricultural purposes and other purposes of general public interest and it authorizes a reasonable charge to cover the cost of the use of such building and property.

7. Title 70 Oklahoma Statutes, Section 5-131 (75) authorizes to board to provide courses for all persons and further, to provide necessary buildings, equipment and other facilities for such persons.

8. Title 70 Oklahoma Statutes, Section 8-101 (114) provides authority for the transfer of pupils from one district to another.

9. Title 70 Oklahoma Statutes, Section 9-101 (124) provides authorization for a school district to provide transportation for each child who should attend any public elementary or high school when certain terms delineated by that statute are met.

10. Title 70 Oklahoma Statutes, Section 10-101 (141) authorizes the board of education to appoint an attendance officer relative to school population and attendance and further permits the board to establish rules and regulations as to attendance relative to the Compulsory Education Law of the State of Oklahoma.

11. Title 70 Oklahoma Statutes, Section 2-101 (20) authorizes the board of education to call both annual and special elections.

12. Title 70 Oklahoma Statutes, Sections 19-101 et. seq. (253-264) provides the authority, but pursuant explicitly to the existing rules and regulations of the State Board of Education to establish and operate a driver's education program.

13. Title 70 Oklahoma Statutes, Sections 1210.222 et. seq. provides authority for the establishment of a drug education program.

14. Title 70 Oklahoma Statutes, Section 24-101(317) provides the authority to suspend students pursuant to violations of school regulations;

15. Title 70 Oklahoma Statutes, Section 24-105 (321) provides power and authority to regulate, control or prohibit any fraternity, sorority, secret society club or group.

16. Section 1 of House Bill 1274, 1973 Legislature (337a) provides the authority to a board of education to remove any person from school property when it appears that the presence of that person is a threat to the peaceful conduct of school business and school classes.

17. Title 70 Oklahoma Statutes, Section 6-114(93) provides authority for the school to administer corporal punishment.

Essentially then these are the powers and duties delineated by the Oklahoma School Code. Each specific power is important, and the statutes, together with enabling rules and regulations promulgated to more effectively instigate the powers, should be thoroughly noted, analyzed and effected pursuant to proper school district operation and management.

As previously discussed, the general rule is that a school district is only permitted to do that which is authorized by statute. Accordingly, if the statute is silent as to a particular matter, the school cannot then assume that it is permissable to enact that particular subject matter. Thus, even though the Oklahoma School Code contains a number of prohibitions which are specific limitations on the powers and duties of the school district,

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these limitations are not the only prohibited acts. That which is not specifically prohibited can still not be enacted unless the subject can be classified within one of the broad powers delineated in the Oklahoma School Code. The purpose of this book is to examine in detail some of the more important statutory powers.

Chapter 1

THE POWER TO PROMULGATE RULES AND REGULATIONS

"Rules, Regulations and Minutes"

Rules, regulations and minutes relate directly to the success or failure of school law litigation. School boards of this state are empowered specifically by Section 5-117 (61) of the Oklahoma Statutes to promulgate those rules and regulations necessary for the operation and control of their particular school district. Aside from the inherent authority of "in loco parentis," school boards are essentially limited to that which is empowered by statute and/or regulation and one must consider the numerous federal and state statutes, rules and regulations of which are enacted, which are to be accounted for when acting as a governing authority.

Each school district should have a program established as to the review, study, promulgation and passage of those rules and regulations necessary and reasonable upon which to operate its particular school system. A review of all rules and regulations presently in effect is suggested, and after repealing those which are no longer necessary (and perhaps obsolete) and amending those calling for certain changes, such package should be formulated and organized in a manner by which usage thereof is easily effected.

The drafting of a regulation is not an easy task. Preparation of eventual passage of a regulation can be as important as passage itself. There must be a reasonable basis of justification for the existence of any rule or

regulation. Input should be desired as to the various facets of the educational community which particularly would be effected by the passage of a specific regulation. Further, "notice" must be both present on the face of the regulation itself and as to its very existence. Further, a regulation should be uniform and non-discriminatory, both on its face and in its application. A board should consider effective management, good order, control, and discipline (in the school system) in drafting any piece of legislation which has as its objective to preclude detrimental conditions to the educational system itself. It should be remembered though, that constitutionality is always presumed as to rules and regulations; but if challenged, same should be legally sound so as to meet whatever test that might be placed before it.

Section 5-118(62) of the Oklahoma Statutes provides for three types of meetings, to-wit: Regular, Special and Adjourned. The statute further restricts a board of education to one regular meeting per month normally to be held on the first Monday of that month, or at any regular time the board designates. Once designated, the board should comply with that regular meeting, date and time uniformly throughout the fiscal year. Special meetings may be held to conduct business for which purpose the meeting is called. Strenuous effort should be made to contact all board members to assure their attendance, and unless all board members are present, no additional business

can be conducted. There is authority saying however, that when all board members are present in a special meeting, "minor" business can be conducted other than that for which the meeting was called. Adjourned meetings are authorized, but limited to a situation whereby it is not feasible to continue the meeting currently in session and impliedly adjourned meetings could not be regularly scheduled within a month, prior to the beginning of that particular month.

Both public hearings and individual hearings should be conducted in special meetings to more effectively facilitate same and to prohibit disruption of regularly scheduled meetings. Further, administrative procedures should be implemented as to how a person and/or group should request forum time before the local board of education. Obviously, it is each person's right to appear before the board and present such information as they feel necessary; but certainly, to implement a more effective board meeting, it is reasonable to require a period of advance notice and information relative to who will make the presentation and as to what information will be covered. If extensive visitations are necessary, then it might be appropriate to schedule a public hearing as to the matters to be brought before the board.

BOARD MINUTES

School board minutes have become increasingly important in recent years. Initially, there was no statute requiring boards to preserve their actions by way of documentation.

Today, Section 201 of Title 25 (525) of the Oklahoma Statutes requires all votes of a board of education to be recorded and Section 115 (527) requires that tentative minutes be furnished to the local county newspaper if same are requested in writing within five days of the meeting concerned. Accordingly, minutes are now required to be documented and (hopefully)preserved in a manner by which reference thereto can be effected and a basis of subsequent board action can be based.

Board minutes speak to "board intent" and they are "prima facie evidence" of action so taken. Board action, though, is effective at the time the particular action is voted upon and passed, not when the official minutes are finally approved at a subsequent meeting. Minutes need not be overly burdensome, but effort should be taken to assure that the final product reflects that which occurred relative to board action. Any method by which a board can assure such happenstance would be permissible, including the usage of a tape recorder and/or a stenographer. An excellent idea to consider is to have the school board attorney review the minutes before final approval of the board to assure proper form and content.

Minutes cannot be expunged, but can be modified. Further, minutes can be rescinded prior to third party rights being vested. Also, it is possible to ratify prior board action pursuant to minute documentation. All "shifts" of board activities should be properly documented within the minutes,

such as initial call to order, going into executive session, recesses and adjournments. For record purposes, all board minutes should be approved prior to the completion of the fiscal year.

Board minutes should follow the prepared and distributed agenda. This is not to say that additional business cannot be conducted, but the meeting should be closely conducted in accordance with the agenda. Minutes are to be promulgated pursuant thereto and it is recommended that the final documentation be distributed to all local newspapers and to any other parties so designated. Upon the conclusion of the approval of minutes, a Superintendent or some designated staff member should pull from those minutes any newly passed rules and regulations and incorporate same in the organized files of the school district. Such will prevent tracing back through compiled board minutes each time that there is a question as to the authorization of board action.

Certainly, all school staff members should be informed by way of agenda, the proceedings to be conducted at each board meeting prior to the commencement of same. Any reports and additional information that the executive officer might deem necessary for the board's review (so that they might be more adequately prepared to reach a decision and take action at the board meeting) should be distributed to the board members and appropriate staff members prior to the meeting. In that same sense, copies of board minutes to be approved at a meeting should be distributed prior to

that meeting for the board member's review and preparation.

It is and should be, the executive officer's responsibility to assure that each board meeting is carried out according to the agenda, all preparations made prior to the "call to order," that seating arrangements are satisfactory and that the meeting pursue in accordance with the assigned agenda and each matter deliberated and determined in an effective and efficient manner. Further, the chairman of the board must be cognizant of rules of order and procedures necessary to assist him in conducting the board meeting. The chairman will normally rely upon the Superintendent, as executive officer, to assure this happenstance; but the Superintendent should assure that the chairman is properly advised and trained in the procedures to be effected.

The essentials of the record are as follows: (a) the kind of meeting, "regular" (or stated) or "special," or "adjourned regular" or "adjourned special"; (b) name of the assembly; (c) date of meeting and place, when it is not always the same; (d) the fact of the presence of the regular chairman and secretary, or in their absence the names of their substitutes; (e) whether the minutes of the previous meeting were approved, or their reading dispensed with, the dates of the meetings being given when it is customary to occasionally transact business at other than the regular business meetings; (f) all the main motions (except such as were withdrawn) and points of order and appeals, whether sustained or lost, and all other motions that were not lost or withdrawn; (g) and usually the hours

of meetings and adjournment, when the meeting is solely for business. Generally the name is recorded of the member who introduced a main motion, but not of the seconder.

In some societies the minutes are signed by the president in addition to the secretary, and when published they should always be signed by both officers. If minutes are not habitually approved at the next meeting, then there should be written at the end of the minutes the word "Approved" and the date of the approval, which should be signed by the secretary. They should be entered in good black ink in a well-bound record-book.

In keeping the minutes, much depends upon the kind of meeting, and whether the minutes are to be published.

When the minutes are to be published, in addition to the strict record of what is done, as heretofore discribed, they should contain a list of the speakers on each side of every question, with an abstract of all addresses, if not the addresses in full, when written copies are furnished. In this case the secretary should have an assistant. With some annual conventions it is desired to publish the proceedings in full. In such cases it is necessary to employ a stenographer as assistant to the secretary. Reports of committees should be printed exactly as submitted, the minutes showing what action was taken by the assembly in regard to them; or, they may be printed with all additions in italics and parts struck out enclosed in brackets, in which case a note to that effect should precede the report

or resolutions. In this way the reader can see exactly what the committee reported and also exactly what the assembly adopted or endorsed.

Conclusively, board minutes should never be removed from the school administration office. Title 51 Oklahoma Statutes, Section 24 provides as follows:

> "It is hereby made the duty of every public official of the State of Oklahoma, and of its subdivisions, who are required by law to keep public records pertaining to their said offices, to keep the same open for public inspection for proper purposes, at proper times and in proper manner, to the citizens and taxpayers of this State, and its sub-divisions, during all business hours of the day; provided, however, the provisions of this act shall not apply to Income Tax Returns filed with the Oklahoma Tax Commission, or other records, required by law to be kept secret."

BOARD OF EDUCATION

INDEPENDENT SCHOOL DISTRICT NO._____,_____COUNTY,

OKLAHOMA

At a (Regular)(Special) (Adjourned) BOARD OF EDUCATION MEETING held on the _____day of_____, 19____, at_____ o'clock____.M. in the board room at _____ the meeting was called to order at _____o'clock____.M.

The clerk(secretary) called the roll:

Members present:

Members absent:

Staff members present:

Quorum noted, Chairman_____presiding, and introduction of the following visitors occurred.

The minutes of previous meeting were read (reading dispensed with) and on motion of Mr._____, were approved.

Motion made and approved (5-0) that board minutes of the _____day of_____, 19____, be incorporated in board of education minute book and those appropriately marked policies contained therein be incorporated in the board of education policy manual under the appropriate classification; further, that those policy items requiring enabling regulation be assigned to the regulation drafting committee for promulgation and submission to the board for approval.

STAFF REPORTS AND RECOMMENDATIONS:

(Written reports are attached hereto)

1. Superintendent (Executive office) report the following items for Board information/consideration/discussion.
2. Principal.....
3. Accountant.....
4. Clerk.....
5. Attorney.....

On motion of Mr._____, all staff reports and recommendations were approved. (5-0)

On motion of Mr._____, or claims (payrolls, encumbrances and purchases) were approved. (5-0)

On motion of Mr._____, the Board adjourned to Executive Session at_____o'clock_____.M. to consider personnel matters. (5-0)

Board adjourned to open session at _____o'clock _____.M.

On motion of Mr._____, the following certified employee contracts were renewed for contract year_____, (5-0) and the Executive office instructed to issue for signature the appropriate documentation.

On motion of Mr._____, the following non-tenured certified employee contracts were not renewed for contract year_____(5-0) and the Executive office instructed to issue, upon proper signature, the appropriate documentation of statutory notice.

On motion of Mr._____, the following tenured certified employee contracts were not renewed for contract year_____ (5-0), each cause or causes indicated thereto pursuant to 70 O.S. Section 6-122 and the Executive office instructed to issue, upon proper signature, the appropriate documentation, including statutory notice, advisement of cause or causes and advisement of reconsideration and for the appellate remedies.

Mr._____ submitted a report with resolution which, after discussion and (amendment), was adopted as follows: (4-1)

(if report is important, same may be "entered upon the minutes")

A Board member may request that his particular dissenting vote be noted in the minutes. For example: (4-1, Mr. Jones dissenting)

Mr._____submitted report and recommendations concerning proposed policy concerning personnel sick leave. On motion Mr._____, policy adopted (5-0) and submitted to Board Attorney for final draft and proposed regulations implementing same.

Finally, the minutes must be signed by the Chairman of the Board, the Clerk of the Board and it is a good idea to have the executive officers signature as well as the board attorney's. Also, there should be a certificate attached by whoever actually prepares the minutes which should read as follows:

"I hereby certify that I accurately transcribed the foregoing minutes and furnished copies to the executive officers, the board clerk and all board members prior to this meeting, but that the original of same was retained at all times in the administration offices of the school district."

Chapter 2

THE POWER TO ACQUIRE, DISPOSE AND USE SCHOOL PROPERTY

"The Administering of Public Properties"

In 1939, a landmark decision was handed down by the Oklahoma Supreme Court in Brooks V. Shannon, 184 Okla. 255, 86P.2d, 792 (1939) where the Court held that boards of education in independent school districts have the authority to operate a complete public school system deemed best suited to the needs of the school district and to hold and convey real or personal property and to exercise sole control over all school property of the district. A school board can exercise powers which have been expressly or implicitly granted and those which are necessarily incidental to the powers expressly granted and those essential to declared objects and purposes of the corporation. (See Board of Education of Oklahoma City V. Cloudman, 185 Okla. 400, 92 p.2d 837 (1939). Moreover, in Title 70, Oklahoma Statutes, Section 5-117 (61) the board of education of an Oklahoma school district is empowered to "dispose of property no longer needed by the district by sale, exchange, lease or otherwise; to purchase necessary property, equipment, furniture and supplies necessary to maintain and operate an adequate school system."

In its operation pursuant to the dictate of the Oklahoma School Code, a school district board of education possesses two broad and important functions:

1. The expenditure of public monies;
2. The administering of public properties.

Interestingly enough, there are few statutory restrictions as to the administering of public properties but there are no specific guidelines for the acquisition and disposition of said properties.

The courts in the past have consistently held that public school property belongs to the State and not to the local governmental unit. A Federal District Court recently reiterated this principal when it noted "that the funds of the district are the property of the State.... and not the property of the district." (See Blout V. Ladue School District, 321 F. Supp. 1245 (Eastern Dist. Mo. 1970). School property is State property, although the governing board, which is the board of education of the school district holds the title. Normally, school districts possess the power to accumulate those properties necessary to meet school district responsibilities and needs. Property so acquired must be for school purposes, and would include property not only for present needs, but for future and further requirements which the districts could or should anticipate at a particular point in time.

School districts acquire property primarily by purchase, gift, transfer or condemnation. The method of acquiring the property is sometimes a factor in it disposition. In Oklahoma, school districts are specifically empowered to acquire sites for the construction and subsequent operation of classrooms, libraries, auditoriums, gymnasiums, stadiums, recreation places, playgrounds, teacherages, school bus garages, laboratories, administration buildings and other school houses and school buildings. The districts are specifically empowered to acquire property by condemnation proceedings

in the same manner as land is condemned for railroad purposes. The power to construct school buildings on lease lands, though, is restricted by Title 70 of Oklahoma Statutes, Section 5-117 in that such is only permissable where other buildings have been erected thereon prior to April 3, 1969, or on land which is leased from a governmental entity, i.e. a military reservation. Broad powers to purchase additional property are embodied in the words of Section 5-117, which states:

> "... to purchase necessary property... to maintain and operate an adequate school system."

As to the disposition of school properties, it has been held that the statutory authority to acquire and utilize school property does not imply the power to dispose of said property. Specific and broad powers of disposal are provided within Section 5-117, which states:

> "To dispose of property no longer needed by the district by sale, exchange, lease or otherwise."

The disposition of school properties essentially becomes more of a public relations problem than a legal problem, although consideration must be given to those real estate deeds which have conveyed property to school districts for the express purpose of school district use. These deeds may include a reversionary clause providing for reversion to the original grantors upon failure of a condition such as the usage of property for school purposes. Of course, a question of fact always results as whether or not the property in question is no longer being utilized for school purposes. Considering the premise that properties may be acquired for that purpose which

may not come into being until the future, it is possible for a school district to maintain property in its possession for a time pending future use.

It is important with respect to the public relations question that a school district promulgate a "school properties disposal procedure". A proposed procedure follows. Uniformity as to both acquisition and disposal is important, and in addition, notice is all important as to the proceedings which result.

SCHOOL PROPERTIES DISPOSAL PROCEDURE

When the Board determines that any real or personal property is no longer needed for school purposes or should, in the interest of the corporation, be exchanged for other property, it may sell or exchange such property in accordance with the provisions that follow:

Sale of Property.

1. Prior to the sale the Board shall cause the appraisal of the property by two professional appraisers who shall make separate reports.

2. A notice of sale shall be published two times in accordance with the law governing notice. The notice shall set out the terms and conditions of sale. The Board may permit the bidders to specify conditions. The notice shall state that bids will be received on a specified date and that the sale shall continue for a period not in excess of sixty (60) days or until the property is sold.

3. All bids shall be available for examination by the public. Any bidder may raise his bid after the Board has given notice by mail to other bidders. The Board may also conduct an auction provided any previous bidder has been given written notice of the auction.

4. The Board may sell the property to the highest and best bidder or may reject all bids. It shall not sell property for less than 90 per cent of the appraisal but may order a reappraisal.

5. The Board may employ a broker or auctioneer who may be paid from the proceeds of the sale without appropriation. The broker or auctioneer may not be one of the appraisers.

Trade-in Property.

Where new property is purchased by the Board in accordance with law or condition that property of a similar nature, owned by the school corporation is to be traded in or exchanged as a part of such purchase in reduction of the price such trade-in shall be legal without appraisal or notice of sale.

Exchange of Property.

In general any exchange of property shall follow as nearly as possible the procedure for the sale of property.

When the exchange is made with another governmental body, the two parties shall jointly petition any circuit court of the county in which either

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of the governmental bodies is located. The court shall cause appraisals to be made. The court shall enter an order, setting forth the appraised value. There shall be no costs other than the fees of the appraisers.

Execution of Transaction.

The Board may execute warranty deeds, quit claim deeds, bills of sale, or any other document reasonably necessary to completion of the transaction.

SOURCE: East Noble School Corporation, Kendallville, Ind.
DATE: 7/73

LEGAL REFS.: Acts of 1965, Chapter 307, Article V
Acts of 1967

Title 70 of Oklahoma Statutes, Section 5-123 provides as follows:

> "No expenditure involving an amount greater than $500.00 shall be made by a board of education, except in accordance with the provisions of a written contract and no contract involving an expenditure of more than $1,000.00 for the purpose of erecting any public building or making any improvements shall be made except upon sealed proposals and to the lowest responsible bidder, provided this section shall not be construed to prohibit a school district from erecting a building or making improvements on a force account basis."

The foregoing section makes no provision relative to the disposition of properties, but only as to the acquisition of same. Obviously, a bid procedure with proper notice and providing the opportunity for all who seek acquisition of school properties to bid upon same is the favored procedure and as such should be utilized and is recommended.

The usage of school property has been a much perplexed question clearly within constitutional overtones. State legislatures have the power to control the usage of school property, including school buildings. Title 70 of Oklahoma Statutes , Section 5-117 (61), provides for the maintenance and operation of a complete school system of such character as the board of education so deemed best suited for the needs of the school districts. This section is the authority by which a board of education has been so delegated to utilize school district property. Remembering that school property is state property, the public may well be entitled to the utilization of said properties under proper administrative and chronological circumstances. It is permissible to permit public groups to use school district property and to

charge cost and expenses to that group. Certainly, if one group is permitted to utilize school properties, then that permission should be granted to all who request and conform to certain administrative and expenditure requirements.

The greatest difficulty involved in the usage of school property is the requested usage of same by religious and/or church oriented groups. Article 2, Section 5 of the Oklahoma Constitution (494) provides specifically that "no public money or property shall ever be appropriated, applied, donated or used directly or indirectly for the use and benefit or support of any sect, church, denomination or system of religion or for the use, benefit or support of any priest, preacher, minister or other religious teacher or dignatary or sectarian institution as such." However, Title 70 of Oklahoma Statutes, Section 5-130 (74) provides that "the board of education of any school district may under such regulations and conditions as it may prescribe, open and school building and permit the use of any property belonging to such district for religious, political, literary, cultural, scientific, mechanical, or agricultural purposes and other purposes of general public interest and may make a reasonable charge to cover the cost of the use of such buildings and properties." Obviously, there is a conflict. It is this author's opinion that under no circumstances may religious groups, whatever their particular domination or persuasion, be permitted the usage of public properties as to do so would clearly be a violation of the Constitution pursuant to the doctrine of separation of church and state. Many districts encounter the problem on a regular basis

in since many small rural areas facilities are in fact limited, and oftentimes the school has the only facility which would be available for a large gathering. Regardless, such is not permissable since the Oklahoma Constitution would clearly take precedent and render unconstitutional Section 74 of said School Code.

As earlier indicated, the acquisition, disposition and usage of school properties is classified as one of the two primary functions of a school district. Pursuant to the Open Meeting Law of the State of Oklahoma, Title 25 of Oklahoma Statutes, Section 201, the public has a right to inquire and/or observe as to the disposition of said properties. Accordingly, a board of education must assure that it promulgated all proper rules and regulations with regard to property matters.

Chapter 3

THE POWER TO CONTRACT WITH DISTRICT EMPLOYEES

"The Anatomy of a Teacher's Contract"

Probably no contract which a school district has the authority to execute is more critical, and at the same time given less consideration, than the basic teacher's contract.

Generally, boards of education will utilize standard "form" contracts (see Form A) provided by the State Department of Education; and typically, as is always true with form contracts, these fall far short in specifying the actual agreements intended or contemplated.

A. THE LAW

Title 70, Okla. Stat., Section 6-101 provides:

> § 6-101. Teachers - Contract. A Except as provided in subsection E of this section no person shall be permitted to teach in any school district of the state without a written contract, except as provided herein for substitute teachers and except teachers of classes in adult education. The board of education of each school district, wherein school is expected to be conducted for the ensuing year, shall employ and contract in writing with qualified teachers for and in the name of the district. One copy of the contract shall be filed with the clerk of the board of education and one copy shall be retained by the teacher, and if the contract is with a dependent school district one copy shall be filed with the county superintendent of schools.
>
> B. No board of education shall have authority to enter into any written contract with a teacher who does not hold a valid certificate issued or recognized by the State Board of Education authorizing said teacher to teach the grades or subject matter for which the teacher is employed. Any board of education paying or authorizing the payment of the salary of any teacher not holding

a certificate, as required herein, shall be adjudged to be guilty of a fraudulent expenditure of public funds and members voting for such payment shall be held jointly responsible for the return of the amount of any public monies thus expended, upon suit brought by the district attorney or by any interested citizen in the district where such funds have been expended.

C. It shall be the duty of the county superintendent of schools and the district superintendent of schools under whose supervision teachers have been contracted to teach to certify to the treasurer of the contracting district the names of the teachers holding valid certificates with whom contracts have been made and the names of substitute teachers employed in accordance with law. Said treasurer shall not register any warrant issued in payment of salary to any teacher whose name is not included in such list and shall be liable on his official bond for the amount of any warrant registered in violation of the provisions of this section.

D. Whenever any person shall enter into a contract with any school district in Oklahoma to teach in such school district the contract shall be binding on the teacher and on the board of education until the teacher legally has been discharged from his teaching position or released by the board of education from his contract. Until such teacher has been thus discharged or released, he shall not have authority to enter into a contract with any other board of education in Oklahoma for the same time covered by his original contract. If upon written complaint by the board of education in a district any teacher is reported to have failed to obey the terms of his contract previously made and to have entered into a contract with another board of education without having been released from his former contract, such teacher, upon being found guilty of said charge at a hearing held before the State Board of Education, shall have his certificate suspended for the remainder of the term for which said contract was made.

E. A board of education shall have authority to enter into written contracts with teachers for the ensuing fiscal year prior to the beginning of such year. If prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified him in writing by registered or certified mail that he will not be employed for the ensuing fiscal year, and if, by April 25, such teacher has not notified the board of education in writing by registered or certified mail that he does not desire to be reemployed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis and on the same salary schedule used for

other teachers in the school district for the ensuing fiscal year, and such employment and continuing contract shall be binding on the teacher and on the school district. Provided that no district or any member of the board of education of a district shall be liable for the payment of compensation to a teacher under the provisions of the teacher's contract for the ensuing year, if it becomes necessary to close the school because of insufficient attendance, disorganization, annexation, consolidation or by dispensing with the school according to law, provided, such cause is known or action is taken prior to July 1 of such ensuing year. (70-6-101)

B. THE WRITTEN CONTRACT

The first basic requirement is that the contract be written. As indicated in the first paragraph of Section 6-101, "no person shall be permitted to teach in any school district of the state without a written contract." Accordingly, each teacher's personnel file should include a written document concerning the contract year of employment specifying a period beginning July 1 and ending the following June 30. (See Attorney General Opinion dated September 10, 1971). A copy of that contract, which pursuant to Section 6-101 is to be filed with the clerk of the board of education, should also be provided the teacher. If the contract is with a dependent school district, one copy must be filed with the County Superintendent of Schools. A teacher's contract is not binding until it has been approved by the County Superintendent. (Attorney General Opinion dated May 1, 1964).

Sub-section "B" of Section 6-101 provides generally that in order for a district to contract with a teacher, that teacher must hold a valid certificate issued or recognized

by the State Board of Education. The only exception to this provision is found in Title 70 Oklahoma Statutes Section 6-105 which allows the employment of a non-certified substitute teacher for a maximum period of twenty days in any one school district in any one school year.

Sub-paragraph "D" of Section 6-101 is an interesting provision in that it states specifically that the teacher's contract is binding upon both the teacher and the board of education. As a practical matter, this is not the case. A teacher may pursue a breach of contract action or avail himself of the remedies provided by Title 70 Oklahoma Statutes, Section 6-103 and Section 6-122 as to possible damages and eventual reinstatement. A local board of education, though, cannot assess a monetary penalty against the teacher for breach of contract (see Attorney Generaly Opinion dated September 20, 1966). Further a court will not grant a specific performance remedy since the contract is one for personal services. The local board, however, does have remedy under sub-section "D". If a teacher has contracted with a board of education for the ensuing year and subsequently enters into a contract with another local board of education without first having been released by the former employer, his certificate can be suspended for the remainder of the term for which the first contract was made. The local board files a complaint with the State Board of Education which then holds a hearing on the complaint. If the state board finds

the teacher guilty of the charge, it has the power to suspend his certificate. It is clear then, that until a teacher has been discharged or released from his contract, he does not have the authority to enter into any other contract with any local board of education in Oklahoma for the same period covered by the original contract.

Some districts in Oklahoma utilize an "intent to be re-employed" form (see Form B) as a planning device. This form is normally issued sometime prior to April 10. It is specifically authorized by Attorney General Opinion dated April 9, 1965, which held as follows:

> "A board of education can require a teacher to, before April 10th, either sign contract for ensuing year, or give notification that he does not desire to be re-employed for the ensuing year."

Technically under sub-section "E" of Section 6-101 the teacher has until April 25 to notify the board of education in writing, by registered or certified mail, that he does not desire to be re-employed for the ensuing year. At the same time, the local board of education must notify the teacher prior to April 10 that his contract will not be renewed. This applies to both tenured and non-tenured teachers regardless of their time in service. Inaction operates to renew employment. The "intent" form, as it exists, is not legally binding on either party and generally would not suffice as a valid contract. It does, however, provide a means of determining prior to the April deadline the teacher's preliminary intentions as to contract renewal. It shall be remembered, however, that the

teacher's written, registered notification of resignation is still required to make the resignation binding.

Many necessary and appropriate terms may be included within a teacher's contract. Certainly, each contract should reflect the basic contract salary, each additional increment applicable, and the additional amounts paid for additional services, i.e., coaching, administrative work, etc. "Form" contracts typically indicate that the teacher is required to follow the rules and regulations of the board of education of the district. Any document, such as a faculty handbook or similar type of publication should be "incorporated by reference" into the teacher's contract, and any specific rules and regulations that will be applicable to a particular teaching field or service, can and should be included within that particular teacher's contract. At the same time, however, care must be taken to assure that those specific rules and regulations do not discriminate against that particular teacher as compared to other teachers employed in the school district. Because certain teachers work different periods of the normal school year, these particular "periods" should be indicated in the contract even though the contract term, as previously indicated, runs from July 1 through June 30. There is a distinction between the contract employment year and the contract work year.

Reference to Section 6-101 should be included in the teacher's contract and care should be taken not to include provisions in conflict with those dictated by Section 6-101.

Other terms and conditions of employment such as teacher residency requirements and teacher academic requirements should also be specifically included in the contract.

C. THE CONTINUING CONTRACT

The employment status of teachers in Oklahoma is either probationary or "tenured." A teacher with probationary contract status is employed for a "trial period" during which time the district evaluates his performance. The probationary teacher has minimal job security because he can be terminated at the conclusion of the school year if the board determines that it is in the "best interest" of the district based on some reasonable justification. A probationary teacher is not entitled to the written statement of causes, a hearing, or the other procedural protections provided be Section 6-122 for the termination of tenured teachers.

After a probationary trial period of three continuous and completed years, the board may elect to employ the teacher on a "contract status-the equivalent of tenure." (This decision is actually made prior to April 10th of the third year.) The "best interest" test applicable to the termination of probationary teachers obviously does not apply to tenured teachers. The tenured teacher can be dismissed only for "cause" under the notice and hearing provisions provided by Section 6-122.

Although all employed teachers have "continuing contracts," that term refers only to the fact that boards are permitted to act on the ensuing year contract prior to the commencement of

that year. The authority to employ certified personnel in advance of the year of employment is found in Article 10, Section 26 of the Oklahoma Constitution. In one sense, then, all teachers, probationary or tenured, operate on continuing contracts (See Attorney General Opinion dated July 19, 1961). Accordingly, it is critical that each teacher's contract contain a statement as to his status of employment, i.e., probationary or tenured (three completed and continuous years service under continuing contract). The "reason" for employment is distinguishable from the term and type of employment, and accordingly, if a teacher is a "temporary replacement" this fact should be clearly indicated.

Sub-section "E" specifically authorizes the ability to contract with a teacher prior to the ensuing year. Although Sub-section "A" seems to say that only the initial contract need be in writing, Sub-section "E" reiterates the "written" requirement.

Many questions have arisen regarding the period between April 10 and April 25. This 15 day period constitutes somewhat a "limbo" situation which tends to be unfair to the employer. Clearly the Board is obligated to a continuing contract as of April 10 if notice of non-renewal has not been <u>issued</u> . (Note that the issuance date, not the receipt date, is critical). The teacher, however, is not obligated until 15 days later. Consider, for example, a situation where a teacher is on leave without pay pursuant to Section 5-117 and has not notified the board prior to April 10 as to her intent to return. Her replacement, even though on a "duration of need" contract (which

is not specifically authorized by statute) is entitled to notice by April 10 just as an other teacher. If the district does not give notice, the replacement teacher is entitled to a contract whether there is a place for her or not. Further, if the board gives notice of non-renewal and then the teacher on leave notifies of her intent not to return by the 25th, some excellent teaching prospects may be lost during the fifteen days of forced delay. This is the reason for the authorization of "intent to be re-employed" forms, and these forms should be made applicable to the teacher on leave so that some type of commitment on his part as to his intention to return can be obtained.

It is emphasized that Oklahoma Law authorizes no employment contract other than the basic teacher continuing contract. No authorization exists for "administrator contracts," "coaches contracts," or "duration of need" contracts. (see however, the following paragraph and Form C). Any contract for a professional employee is based on the premise that he is first and foremost a <u>teacher</u>. Accordingly, all professional employees attain time in service as to tenure qualification solely on that basis.

All other employees essentially serve at the pleasure of the board and can be released at its pleasure since they have no claim to tenure or other guaranteed benefits, terms or conditions of employment. A board, however, does have the right to contract with these employees and, upon doing so, the terms of the contract would govern.

It is interesting to note that although an administrator is a teacher under the law, a board has the specific statutory right to contract separately with a superintendent or principal. It is possible that this statute creates an entirely separate power and, accordingly, these administrators may not be subject to tenure attainment. The Superintendent, as the statutory executive officer of the Board, might very well not possess a right to tenure. Only the teacher, pursuant to Section 6-122, and school nurses, under Section 1-116, are statutorily granted the right to tenure.

Clearly staff personnel such as clerks, treasurer, physician, attorneys, lobbyists, dentists, optometrists, bus drivers and janitors have no such right absence specific legislation to the contrary as in the case of the school nurse.

Section 6-105 (13) provides authorization for a Board to contract with a substitute teacher who is properly certified. The question , then, is what is the difference in a "substitute teacher's contract" and the "regular teacher's contract?" Because the contract year is July 1 through June 30, there probably is no difference, as a practical matter, and all requirements of employment and termination would apply. Once again, the specific period of employment should be determined in the contract itself.

Briefly summarizing, in Oklahoma the basis of the employment contract is provided by statute. All statutory provisions should be incorporated in the contract and any

applicable terms and conditions of employment should be clearly defined. This procedure will create a working, legally binding instrument rather than just an inconclusive form which complies with the "formality of procedure."

D. PART - TIME TEACHERS: NOTICE AND TENURE

1. Notice

The term "regularly employed teacher" found in Title 70, Oklahoma Statutes, Section 6-101 (e) would seem at first glance to exclude part-time temporary replacement and substitute teachers from the April 10 notice requirements. However, a thorough examination of the statutes reveals that this is not necessarily true, and it is recommended that notice be provided for all teachers in special catagories. It would appear that, except perhaps for the substitute teacher, they are all entitled to the same grace period as the so-called "regularly employed" teacher.

Section 6-105 (a) provides specifically for the employment of the "substitute" teacher:

> "If because of sickness or other reason a teacher is temporarily unable to perform his regular duties, a substitute teacher for his position may be employed for the time of such absence."

Under this statute a "substitute" is one who works on a day-to-day basis. Accordingly, the substitute would not be subject to the notice requirements.

Sub-paragraph C of Section 6-105, however, further specifies that:

> "Any substitute ... teacher employed in any school system on a monthly or annual basis shall hold a certificate and have a written contract in the manner and under the same conditions as for regular teachers."

This is the section which can be construed as authorizing the "temporary replacement" teacher. It is clear that this teacher who is working under a written contract would be subject to the same terms and rights granted the regular teacher. The "temporary replacement teacher" and the teacher hired for "the balance of the semester" just as any other teacher, full or part time, working on an extended contract basis, would be entitled to the statutory notice.

2. Tenure

The "temporary replacement" teacher is normally a teacher who is employed on a full time basis, but who is replacing a "regularly employed teacher, the latter perhaps being on a leave of absence. Often, as discussed in sub-section C, many school districts contract with such replacement teachers on a duration of need basis.

Section 6-105 (c), set out in sub part 1 above, grants these teachers, who are employed under written contract, all the rights, remedies, terms and conditions granted the regular teacher. Technically, this would be construed to include tenure. Practically though, the problem of tenure should not arise with these teachers as Section 6-122 requires three continuous completed years to attain tenure. It would be unlikely that the teacher for whom the replacement had been

hired would be absent for such an extended period of time since leave periods normally operate no longer than one year.

The "substitute" teacher is nothing more than a short-term "temporary replacement" teacher. A New York Federal District Court Case (Canty v. Board of Education, 470 F. 2d 1111, 1972) recently held that a substitute teacher has no contract rights of tenure and may be terminated at any time. Clearly, under Section 6-105 (a) this would apply only to the substitute working on a day-by-day basis.

The part-time teacher is not referred to anywhere within the Oklahoma School Code, but realistically, she is a very important element of many school systems in this state.

Recently, the Oregon Attorney General ruled that:

> "...teachers, employed on an annual basis, who work two to three hours a day are part-time teachers. Such two to three hour days are not "days" as that term is used in the Oregon statute defining the term "year" for purposes of determining eligibility for continuing service status under Oregon's Continuing Contract Law."

This opinion would seem to say that the part-time teacher is not subject to tenure qualification since a two or three hour "day" does not constitute the full day necessary to accumulate tenure.

A similar question, however, was presented to the Massachusetts Court in a 1973 case, Ryan v. Superintendent of School, 297, N. E.2d 37 Mass. (1973). That court in holding that the part-time teacher had acquired tenure, made the following comments:

1. The statutory provisions giving tenure to a teacher elected by the school committee after having served for three consecutive school years are mandatory (this is identical to Oklahoma's Section 6-122);

2. The tenure statute recognizes no separate classification of part-time teachers. The sole test mentioned... is service for the three previous consecutive school years. (This is also identical to Oklahoma's Section 6-122);

3. In the specific case before the bar, the teacher was hired annually to teach a specified portion of every week of each of the eleven consecutive school years...accordingly we hold that regular and continuous part-time teaching can constitute the basis for attaining tenure....;

4. We hold that the teacher attained tenure before the time the school district sought to terminate the teacher's services. In so holding, we look to the substance of the relationship between the teacher and the administration and give to the teacher the benefit of tenure intended by the statute notwithstanding the school district's usage of the device of annual contracts in annual terminations of those contracts. (Ryan V. Superintendent of Schools of Quincy, et al., 297 N.E.2d 37 (Mass. 1973).

It should be noted that the teacher in question had taught consecutively for ten years within the school district with slight changes in the number of teaching days per week occurring each year. Her compensation in each year was computed on the basis of the pay of a regular teacher, but prorated to the number of days for which she was hired. The teacher's position was entitled a "permanent substitute" although the facts were that the teacher was not "filling in" for any absent teacher. The sole argument on the part

of the school district was that the teacher had not attained tenure simply because she was only a part-time teacher.

If Oklahoma follows the Ryan case, then a part-time teacher is eligible to attain tenure if that teacher can be classified as a regularly employed part-time teacher. It would seem ridiculous to say that such a teacher would have to serve a period of six years in a district in order to so qualify for tenure. That is one way to construe the Oregon Attorney General holding although Oregon is more likely saying that if a teacher is classified as part-time, then that teacher can never attain tenure.

One additional problem needs to be mentioned. That is, the situation where a school district contracts with a teacher during the course of the academic year for "the balance of the semester." The question presented is whether that teacher, if rehired for a subsequent year, could count the partial year for a full year pursuant to tenure qualification.

The majority of teachers do not teach a full twelve month year. Accordingly, the "year" in Section 6-122 refers to the actual employment period, rather than the contract period which by law begins July 1 and runs through June 30. Therefore, a teacher's particular period of employment service in any one so-called "academic year", could well constitute

a full year of time in service for attainment of tenure. Clearly, if a teacher is hired for the balance of the semester near the end of the term, it would be highly irregular to credit that teacher with a full year of time in service. However, if the teacher were hired for the balance of the school year in October, for example, then that teacher might well be entitled to a full year's credit of time in service. It is clear that a teacher who has been hired for the balance of a particular term is entitled to the notice requirements of Section 6-101(e).

The Continuing Contract Law is applicable to that teacher as it is to any other teacher. To "quibble" over a few months of time in service in the case of a teacher who is in the third year of employment but commenced that employment in the middle of the initial school year seems to be a waste of energy at best. And it could be disastrous for the school board that fails to provide the rights and remedies indicated in Section 6-122. As a practical matter, because of the April 10 notice requirement, the probationary period for teacher's who start work at the beginning of the school term is really only thirty months, or two and a half years, at most. Accordingly, it is recommended that if a teacher is employed for a substantial portion of the academic year, she is entitled to a one year time in service credit for tenure purposes.

E. Termination Grounds

A recent Attorney General Opinion dealt extensively with the question of termination of tenured teachers in Oklahoma (Opinion No. 73-141, May 31, 1973). The opinion addressed itself to two specific questions:

1. Where a board of education of a school district has a policy or regulation requiring teachers to retire when they reach 65 years of age, can the board legally terminate the employment of a teacher who has acquired tenure in that district when such teacher has reached a specified retirement age?

2. Can the board of education of a school district legally terminate the employment of a teacher who has acquired tenure in the school district when the reason for termination is a loss of attendance or lack of available funds caused by a reduction in federal funds?

On the retirement question the Attorney General held that if a district has specified retirement policy, then age would be clearly acceptable as a grounds for non-renewal, but notice in accordance with Section 6-101(e) would be required.

The second question is more difficult. The statutes provide only that the closing of the school is a ground for termination. Additionally, there is the question of possible reassignment to another school within the district. In his opinion, however, the Attorney General clearly indicates that the closing of the total school is not required. Merely closing or discontinuing a particular class, department or program within the school can be grounds for termination.

On careful examination, the Attorney General's Opinion appears to make a clear distinction between the grounds required for dismissal of a teacher during the course of the teacher's contract and the grounds required for denying re-employment of a tenured teacher. Prior to this opinion it was generally believed that since the grounds in the dismissal statute (Section 6-103) and the non-renewal statute (Section 6-122) were identical, any dismissal or non-renewal would have to be based on these statutory grounds. The Attorney General, however, indicates a distinction. In his opinion, for a dismissal a district is limited to the statutory grounds in Section 6-103; but for a non-renewal, the Attorney General stated:

> "The reemployment of a tenured teacher, however, may be refused by a board of education on grounds not included in the statute where such grounds are matters within the discretion of the board in determining the character of the school system it administers and are external to particular conduct of an individual teacher."

The Attorney General relied upon Title 70, Section 5-117 for the conclusion; this statute was also the basis of his decision on mandatory retirement. The opinion concluded with the following holding:

> "While a teacher with tenure may not be dismissed during the term of an existing contract except upon grounds specified in the contract or statutes, the board of education may legally choose not to renew the contract of a tenured teacher where the board in good faith bases the non-renewal of a loss of attendance, the lack of available funds caused

by reduction in federal funds or a mandatory retirement age policy."

While the formal opinion of an Attorney General is always subject to court challenge, until the time of any such challenge in court, it stands as the state's interpretation of the law.

It should also be noted that the Attorney General has clearly indicated that, although there are statutory grounds for dismissal and non-renewal, additional grounds may be included and incorporated within the teacher contract.

F. Reassignment and Elimination of Positions

The following questions are relevant to the subject of elimination of positions and reassignments:

1. Do school boards have the right to eliminate positions or reassign?
2. Do school boards have the power to terminate a teacher whose position has been abolished?
3. When has a position been eliminated?
4. How does a school board determine whether a teacher whose position has been eliminated is qualified for reassignment to another existing post?
5. How does a board select the particular teacher for termination or reassignment?
6. Assuming that the teacher is qualified for more than one available position to which position should the board reassign him?

In answer to the foregoing questions, consider the following basic principles:

1. According to appropriate procedures a school board may eliminate positions so long as its actions are in good faith.

2. A teacher certificate is prima facie evidence of whether he is qualified for reassignment to an available position.

3. For retention and dismissal, qualified teachers prevail over non-qualified teachers, qualified tenured teachers prevail over qualified non-tenured teachers, and between qualified tenured teachers the board may use its discretion.

4. As to any retention or reassignment the board may use its discretion.

The authority to reassign is relatively undisputed if the reassignment is in good faith and the position is of the same rank or grade as that to which the teacher had originally been elected and for which the teacher is obviously qualified. If a reduction in salary is involved, however, the reassignment may constitute a removal and, accordingly, be in violation of the tenure law.

As to the transfer from school to school, it has been held that a teacher who has obtained permanent status does not, under the statutes, acquire a vested right to teach in any certain school. Further, employment under a continuing contract does not prevent a board of education from transferring a teacher from one school to another or from one teaching position to another, unless the contract

specifies the school or position in which the teacher is to be employed. As often indicated, the contract provisions always control. More recently, it has been held that all teachers may be subject to assignment in any school within a district in order to achieve racial desegration of school facilities. (See 394 F.2d 410, 4th Cir.).

Looking at the reduction in salary issue alone, the permanency of tenure does not necessarily carry with it assurance against changes in salary. The board does have the power to reduce the salaries of permanent teachers provided that power is exercised in good faith, reasonably, and without discrimination or arbitrariness; and provided that no attempt is made after the beginning of the school year to reduce salaries for the year. As has been suggested, any extra duties that are paid for, i.e., coaching, administrative, etc. and the amounts paid, should be separately stipulated within the teacher's contract, so in case of reassignment or a readjustment of positions, a board of education will not necessarily be bound to a salary higher than that normally provided for the position remaining.

G. Conclusion

Without doubt the spectrum of teacher contracts is an extensive and complicated one. The contract is not one to be entered into lightly, renewed automatically or terminated unequivocally.

The public employer-employee relationship is a relationship highly valued by the law, and accordingly, certain protections are provided. The law must be followed to the satisfaction of the authorities, and the power of employment must be exercised in a fair and reasonable manner based on good faith in every aspect. A concerted effort to follow the statutory guidelines in the formation, renewal and termination of employment contracts must be regarded as a mandatory task of unequaled significance in the area of school law today.

ADDENDUM TO THE POWER TO CONTRACT WITH DISTRICT EMPLOYEES CHAPTER

A Washington State Supreme Court has recently cleared the confusion with respect to extra duty assignments with school districts. The Washington Court in Kirk v. Miller, 522 P.2d 843 (1974) has ruled the Continuing Contract Law does not apply to special assignments outside the required curriculum even if these assignments are the subject of a supplemental contract. In making this ruling the court defined extracurricular activities as including coaching, athletic competition, musical organizations and special interest groups. Therefore, these duties come outside requirements under the State's Continuing Contract Law.

This type of special assignment, the court added, is in no way vested nor covered by the Continuing Contract Law. This case raises the questions as to whether or not a coach or band director, for example, should be contracted with separately or contracted with at all. Simply answered, there is no need for a contract other than a basic understanding of the assignment and an agreed stipend which is appropriate for such a special assignment. Any such assignment should be made at the discretion of the board of education and could be terminated by that board at any time or the board could reduce the stipend at any time.

Until now, it has been advised when executing a teacher's contract, to include the extra duty provisions in the contract separately and state the stipend separately. It appears now that it would be best not to include such assignment at all within the basic teacher's contract. (See form G for example of an extra duty assignment referral). Conclusively, coaching

assignments can be treated just as staff assignments as is the board attorney, board accountant, board architect, who are hired not on a contractual basis, but on a "serving at the pleasure of the board" basis.

Even though a coach does not have tenure and this is clear under the law, whenever one contracts with another, certain interest are vested and relief from those duties during the term of the contract might prove to be extremely difficult. Accordingly, one who serves at the pleasure of the board may be relieved at any time, without justification and without any procedural due process remedies being made available. It has been said that a coach's tenure relates directly to his "won-loss" record, but there may well be other factors involved when a school district determines that extra duty assignments must be terminated as to a particular employee.

The following is a speech given by author Larry French concerning whether or not an Oklahoma administrator is qualified to attain tenure pursuant to Section 6-166 of Title 70 of the Oklahoma Statutes. This speech was given to state administrators at a conference held in June, 1974.

"IS AN OKLAHOMA ADMINISTRATOR QUALIFIED TO ATTAIN TENURE PURSUANT TO SECTION 6-122?"

It has always been assumed that the Oklahoma school administrator (both Superintendent and Principal) are qualified to attain tenure as promulgated by Title 70, Oklahoma Statutes, Section 6-122, based upon the premise, that first and foremost, the administrator is defined as a teacher, pursuant to Title 70, Oklahoma Statutes, Section 1-116(1) and further, Section 6-122 refers to "any teacher."

Administrators are employed pursuant to Title 70, Oklahoma Statutes, Section 5-117, which permits the local board of education to specifically contract with "Superintendents, Principals" and, in accordance with Oklahoma's Continuing Contract Law, found in Title 70, Oklahoma Statutes, Section 6-101. Section 5-117 could well authorize a special "administrator's contract" which in itself, would not necessarily include a right to the accumulation of time and service relative to tenure attainment. If a board of education was authorized to contract with an administrator in excess of one year at a time (if the law so provides in Kansas) then tenure again would not be applicable, although the administrator would be entitled to certain procedural due process rights by virtue of his public employee status. Consider, however, that a continuing contract

law does not confer tenure rights, section 6-122 being a tenure law and not a continuing contract law.

Title 70, Oklahoma Statutes, Section 1-116(4) seems to exclude the administrator from the normal connotation of "teacher" by stating: "all persons holding proper certificates and connected in any capacity with the instruction of pupils shall be designated as "teachers"." Emphasizing further, Section 5-117 specifically separates those positions necessary within the school district as heretofore cited, i.e., "Superintendents, Principals."

Possibly the entitlement of this article should be rephrased..... "Does an Oklahoma Administrator Desire to Attain Tenure Pursuant to Section 6-122?" A major premise has been that a management official should not be subject to the same employment rights as that of labor. Many states including Kansas, implement this theory by extending the period by which a school district can contract with its administrator. Oklahoma has attempted this type of legislation, but such has failed to pass muster. Clearly, if the Oklahoma Administrator could be employed in excess of one year he would not be subject to Section 6-122 as indicated heretofore. Accordingly, the school district being limited to the issuance of one year contracts, the administrator finds himself subject to the identical employment limitations as does the classroom teacher.

The District Superintendent is not only defined by statute, but appointed statutorily as executive officer of the board pursuant to Title 70, Oklahoma Statutes, Section 5-106. The Building Principal, however, does not enjoy such statutory appointment, but is defined by Title 70, Oklahoma Statutes, Section 1-116(3) and referred to specially several times throughout the Oklahoma School Code as having specific powers, to-wit: to suspend

extensively students pursuant to Sections 24-101 and 24-102.

One should consider the premise that a board does not hire a teacher to be Superintendent, but hires a superintendent to be superintendent, the same applying to the principal. If accordingly, an administrator does not succeed, then why should a board be required to reassign him to the classroom pursuant to the requirements of Section 6-122 unless that board also sustains grounds as to termination of the administrator as a classroom teacher (which would be impracticable, the administrator having not performed such function during the course of his employment." Clearly, the board does have the authority to reassign, but why should an administrator being reassigned to the classroom for no other reason than to comply with the tenure law?

Certainly, the administrator holds a special position in relation to the school board. First of all, he is management; secondly; he possesses certain statutory responsibilities; third, he actually employs a labor force with broad approval (which is nothing more, generally, than a rubber stamp). It would reason that an administrator, who poorly performs his duties, should not only be relieved of those duties, but should not be retained in the system which employed him to be an administrator.

The teaching-principal presents a unique problem. It has been often commented that principals should represent management in negotiations; but, if one is a classroom teacher one-half of the time and an administrator one-half of the time, such complicates any proposed classification of management and labor. Such position is specially authorized by statute. (See Title 70, Oklahoma Statutes, Section 1-116(J) but simple logic would recommend the

termination of such dual positions to more clearly equate the status of the administrative process.

A full-time Building Principal recently challenged his termination (Non-renewal) and exercised his proposed tenure rights and remedies. Once again, the question of tenure qualification was never raised. In this case, reassignment was considered, but as one board member put it, "We hired him to be a principal... if he cannot handle that assignment, his employment should not be continued."

Certainly, administrators are entitled to some employment protection as against the arbitrary and capricious action of their employer. Dr. Marion McGhehey of Kansas recently stated two requirements to insure administrator-board tranquility and stability:

(1) The board should clearly state to the administrator as to the board's particular dissatisfaction as to his performance;

(2) The administrator should keep his board fully informed at all times.

Dr. McGhehey further emphasized, that we expect far more from an administrator today than ever before. In fact, the administrator has become "politicosized" in that he has become the spokesman and public relations appointer for the district, somewhat removing such burden from the board. The administrator today represents the district in every way: (1) he is the one responsible for teacher termination hearings;(2) he is the one who must initially confront negotiations; (3) he is the one who must stand publicly on integrations and related issues; (4) he is the one responsible for all the answers; (5) he must deal with all factions of education, including but not limited to, the State Department,

the patrons, the County Superintendent, the students, the faculty, the staff and the local board itself. He must meet the press, and deal with concurrent public officials who are not to be ignored. He must also parlay the athletic program, pacify the head football coach and deliberate with the local ACT President, not to mention utilizing such resources as the school board attorney, school clerk and school accountant.

What has happened to the educator? Somewhere in the mass of politicalization he has been lost, perhaps never to be found again. Who needs tenure after all this... perhaps a bufferin and a trip out of town might be more appropriate. Not to omit the Building Principal, all of the foregoing, plus such applications as student confrontations, faculty gripes and grievances and keeping the Superintendent happy and satisfied, constitute no less than what is expected of his position.

So maybe, tenure is not all what it is "cracked up" to be, when it comes to performing the arguous duties of an administrator. Certainly, a board who hires one to be an administrator expects just that...not a classroom teacher in disguise. Maybe we will someday know if an administrator is qualified for tenure; but in the meantime I am not to sure that many qualified and competent administrators really care.

Consider the following report concerning the issue herein, out of California.

During the first two weeks of March,1970, the Los Angeles City School District notified about 1700 certificated administrators that they might be released from their positions for the following school year. This written notice was given pursuant to a 1969 California Statute that then provided that

"Unless a certificated employee holding a position

> requiring an administrative or supervisory credential received written notice by March 15 that he may be released for the following school year, the employee's contract shall be renewed on the same terms and conditions as were embodied in his last contract."

The notice was given because of the expectation that only limited funds would be available to the Los Angeles City School District during the 1970-1971 school year, in tandem with the future plans of the District to reorganize extensively its administrative structure.

The plaintiff, and organization of administrative employees of the Los Angeles City School District, filed suit, contending that, among other things, the "mass demotions" were constitutionally and statutorily defective. The Los Angeles Superior Court upheld the validity of the District's action and the plaintiff organization appealed.

The California Court of Appeal, in the course of its seven-page opinion, concluded that:

1. Certificated administrators and supervisors "are not permanent employees as such. They are, however, permanent employees as and only as classroom teachers." In short, with the sole exception of the San Francisco City School District where certain certificated administrators and supervisors have "tenure" in such provisions by virtue of a city-county charter provision, certificated administrators and supervisors do not have "tenure" in their administrative or supervisory positions in California. Instead, such persons have contracts of employment extending from not less than one to not more than four years. (In practical terms, a certificated administrator or supervisor is protected against demotion during the period of his employment contract by contract law. At the end of his employment contract, the "tenure" law does not

guarantee him the right to a new contract of employment. If a new contract of employment is not offered to him by the school board and he received proper written notice, his only right -- if otherwise qualified -- is to return to the classroom as a teacher."

2. The California statutes governing the lay-off of certificated employees from their employment because of the reduction of pupils or particular kinds of service and guaranteeing employees to be laid off a formal hearing do not apply to demotions of certificated administrators and supervisors.

3. The written notice of possible non-reemployment under the 1969 notice statute does not have to be approved in advance by the school board; the superintendent and his deputy may properly authorize the sending of these "warning notices."

4. The written notices sent pursuant to the 1969 notice statute were not unconstitutionally vague simple because they neither specified what particular types of administrative and supervisory services were to be discontinued nor gave reasons for the demotions. As the Court remarked, the certificated administrators and supervisors who received the written notice

> ".....having no tenure in their promotional level positions from which they were being demoted, were not entitled to constitutional due process prior to the deprivation of the positions because their interest in the positions were not encompassed by the Fourteenth Amendment's protection of liberty and property. Stated otherwise, their expectation of continued employment in their promotional level positions was not an interest warranting such constitutional protection."

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5. Reassignments of certificated administrators and supervisors may be made without regard to competitive examinations or seniority if these two elements are not included in the reassignment procedures adopted by the school board.

The California Court of Appeal affirmed the judgement of the lower court. Council of Directors and Supervisors Vs. Los Angeles Unified School District. 32 CA 147 (Cal App. Ct. - 1973).

Consider also this earlier case concerning the Reassignment of Administrators Ruled Not Subject to Same Rules as That of Teachers.

Petitioner was a Dean of Students at a high school in Santa Barbara. In October, 1971, he was informed that he was being re-assigned as a classroom teacher for the next school year. He requested a written statement of the reasons for his impending demotion and reassignment. The district superintendent provided a statement that listed twelve reasons which primarily articulated a loss of confidence by the superintendent for the performance of the dean and a deterioration of the working relationship between them. The dean then asked for a hearing before the district board of education.

The board hearing affirmed the superintendent's decision and the dean took the issue to the local Superior Court which ruled for the school board on demurrer. The dean appealed to the California Court of Appeal

In sustaining the trial court and affirming the judgment for the school board, the Appellate Court said:

"We think it clear that, as opposed to classroom teachers, an administrator attains no tenure in his status as such. He serves as an administrator at the pleasure of the appointing power. Nothing in the statutes above quoted limits of authority of the appointing power to remove an administrator for any reason satisfactory to that appointing power; nothing in the statutes entitles an administrator, so removed, to any hearing, other than the requirement that, on request, he be furnished with a statement of the reasons for his reassignment to a different status."

Referring to this different treatment by the law of teachers and school administrators, the Appellate Court declared

"The distinction is not without reason. Certification as a classroom teacher and permanent status as such come after proof of teaching capacity; that status does not call for day-to-day cooperation in a wide variety of administrative decisions, often dealing with novel situations. But a second or third level administrator bears to his superiors a relationship of the most intimate nature, requiring complete trust by the top administrators in the judgment and cooperative nature of the subordinate. The loss of that trust is not a matter susceptible of proof such as is involved in the cases where a classroom teacher is dismissed or demoted for objective acts of misconduct. To introduce into the administrative structure the elements of discharge for "cause" and of formal hearing would be to make effective school administration impossible. The statutes do not require that."

The Appellate Court concluded by remarking that

"We recognize that, as petitioner contends, his demotion involves a reduction in compensation and some loss of professional standing. But those consequences follow in every case of the discharge of any employee-at-will. We are not persuaded that public school administrators hold some kind of special status that entitles them, as a matter of constitutional right, to more formality in their transfer than the law affords to employees in general."

The Appellate Court sustained the trial court's demurrer and upheld the reassignment of the dean.

Hentschke vs. Sink, Calif. Court of Appeal, Second District, Div. 4, 34 CA 3d 19 (California Appellate Court - 1973).

Forms referred to in this chapter relating to contracting for employment.

FORM A - State Department Teacher's Contract

FORM B Intent Form

FORM C Administrator's Contract

FORM D Minnesota Substitution Teacher Contract

FORM E Oklahoma Substitution Teacher Contract

FORM F Temporary Teacher Contract

FORM G Extra Duty Provision

FORM H Duncan's Teacher's Contract

Form A State Department Teacher's Contract

TEACHER'S CONTRACT

Supt's Copy, White
Clerk's Copy, Pink
Teacher's Copy, Buff

FORM S-187
Capitol City Printing
Oklahoma City, Okla.

This Contract, made and entered into this _____ day of _____, 19____ by and between _____ School District No. _____ of _____ County, Oklahoma, hereinafter referred to as the District, and _____ hereinafter referred to as the Teacher, who holds Certificate No. _____ issued by the State Board of Education of the State of Oklahoma, based upon a _____ and valid for the period of this contract, Witnesseth:

The District hereby employs the Teacher to teach in the school or schools of the District during and throughout the school year 19____, 19____, at a salary of $_____ Dollars, per school month for ten (10) school months, or at a salary of $_____ per calendar month for twelve (12) calendar months, total salary $_____.

The Teacher agrees to keep himself qualified throughout the term of this Contract: to observe the rules and regulations of the Board of Education of the District, to perform such teaching services during the term of this Contract as the Board of Education of the District, or the undersigned Superintendent may require; to keep such registers and records, and to make such reports, as may be required by the undersigned Superintendent; and to preserve in good condition and order the school building in which he teaches, and its grounds, and all furniture, equipment, apparatus and other property coming under the immediate supervision of the Teacher. It is understood that the Teacher is subject to any assignment in any field in which he is qualified.

This Contract shall be binding upon the Teacher and upon the Board of Education of the District until the Teacher has been legally discharged from his teacher position or released by the Board of Education of the District from this Contract, and until the Teacher has been thus discharged or released, he will not enter into a contract with any other Board of Education of the State of Oklahoma for the same time covered by this Contract.

If the Teacher is legally dismissed or has his certificate annulled during the term of this Contract, then the Teacher will not be entitled to compensation from and after dismissal or annulment of his certificate.

Neither the District nor any member of the Board of Education of the District will be liable for any amount of difference between the amount of this Contract and the amount of the estimate made and approved for the fiscal year during which this Contract is effective, nor shall the District or any member of the Board of Education of the District be liable for the payment of compensation to the Teacher for the unexpired term of this Contract in the event the school building is destroyed by accident, storm, fire, or otherwise, and it becomes necessary to close the school because of inability to secure a suitable building or buildings for the continuation of school. Nor shall the District or any member of the Board of Education of the District be liable for the payment of compensation to the Teacher under the provisions of this Contract or any extension thereof as provided by law for the ensuing school year if it becomes necessary to close school because of insufficient attendance and disorganization, annexation, consolidation or school is dispensed with according to law, provided, such cause is known or action therefore is taken prior to July 1st of such ensuing year.

The Teacher will attend all educational meetings called by the undersigned Superintendent and will cooperate with the undersigned Superintendent in the development of the educational interests of the schools of the District; and no deductions shall be made from the salary of the Teacher for any loss of time occasioned by attending any said educational meetings.

The Teacher shall be entitled to sick leave, for such period of time and under such conditions as provided by law.

This Contract shall be subject to the provisions of laws relating to employment on a continuing contract basis, and said provisions are hereby made a part of this contract.

The Teacher will observe and comply with the provisions of the Oklahoma School Laws, all of which are hereby made a part of this Contract.

It is agreed that to the best knowledge of the District and the Teacher, the following data is correct:

_____ School District No. _____ of _____ County

_____
The Teacher

By: _____
President of Board of Education

_____
Board Member

_____
Vice President of Board of Education

_____
Board Member

Attest: _____
Clerk of Board of Education

_____
Superintendent

Approved this _____ day of _____ 72 _____, 19____

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Form B

ntent Form

INDEPENDENT SCHOOL DISTRICT NO. ___ OF _____ COUNTY,

OKLAHOMA

DECLARATION OF INTENTION TO BE RE-EMPLOYED FOR FISCAL YEAR _____

TO: _____

Pursuant to the provisions of Title 70 Oklahoma Statutes, Section 6-101(E), you must notify this school district by April 25, in writing and by registered or certified mail, in case you do not desire to be re-employed for the ensuing year as indicated above. If you do not so notify and if you have not received notification of non-renewal which is to be issued in writing and by registered or certified mail by this school district prior to April 10, then you shall be considered as being employed for said year pursuant to a written contract which will be issued effective July 1.

In order that this school district might more adequately plan its faculty for the ensuing year and further, because the school district annually acts upon teacher employments at the monthly board of education meeting in _____, you are asked to complete this form and return same to the Office of the Superintendent no later than _____. This form is not to be considered a contract, but will be considered as your resignation if that be the case, subject to the approval of the board of education.

PLEASE CHECK THE APPLICABLE CATEGORY:

_____ 1. Upon completion of this school year, I will have ____ year(s) of continuous, completed service with this school district and plan to remain with same for the ensuing year.

_____ 2. I have, or intend to file a request for leave of absence without pay, pursuant to Title 70 Oklahoma Statutes, Section 5-117 for the ensuing year.

_____ 3. I hereby resign my employment with this school district effective June 30.

If there is any change in your plans prior to April 25, you are to immediately notify the Office of the Superintendent. Once that date has passed, you have a continuing contract in effect pursuant to Title 70 Oklahoma Statutes, Section 6-122 if you have completed three continuous years in service with this school district, or if you have not, you do have a contract in effect pursuant to Section 6-101(E) and you are hereby given notice that employment with any other school district, unless specifically released by this school district, could result in the suspension of your teaching certificate pursuant to Section 6-101(D). By signing this form, I hereby certify that my teaching certificate is currently valid and will continue as such during the ensuing year.

_____ _____

SIGNATURE OF EMPLOYEE DATE OF SIGNING

_____ _____

SIGNATURE OF PRINCIPAL DATE OF SIGNING

_____ _____

SIGNATURE OF SUPERINTENDENT DATE OF SIGNING

W. B. EDWARDS
ATTORNEY AT LAW
P. O. BOX 1203
[illegible], OKLAHOMA 74056

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Form C

Administrator's

Contract

ADMINISTRATOR'S CONTRACT
Woodward Public Schools
Woodward, Oklahoma

THIS AGREEMENT, made this___day of_____, 19__, by and between the Board of Education of the City of Woodward, District I-1, Woodward County, Oklahoma, party of the first part, and_____, a legally qualified teacher, party of the second part.

WITNESSETH: The party of the second part is hereby employed as an administrator by the party of the first part for a term of__months beginning on the___day of_____, 19__, and to perform to the satisfaction of the Board of Education and the superintendent of said schools all of the duties that may be assigned in any building, room, department, grade, or subject.

For such services the first party agrees to pay an annual salary of $_____ to be paid in____monthly installments on or before the last day of each calendar month. The party of the second part shall be granted__weeks vacation at a time mutually agreed upon by the superintendent of schools and the party of the second part.

The second party agrees to observe and be bound by all present and future rules and regulations of the Board of Education and all directions of the Superintendent of Schools of said city; to follow the course of study adopted for said schools, using only the textbooks and other materials for instructions as are authorized by law or regularly adopted for use in such schools; to carry out the duties required by law and such additional duties as may be prescribed by the Superintendent of Schools of said city; to keep accurately and to prepare correctly all reports required by the Superintendent of Schools and the Board of Education.

The second party also agrees to maintain the necessary qualifications for the work assigned, making daily preparation for such work, pursuing such educational reading courses and attending such teachers' meetings as may be required by the Board of Education or the Superintendent of Schools.

The second party also agrees to report for duty on date employment begins and to remain on duty through the date of termination hereof.

The School District is authorized to make such deductions from salary as provided by law and resolutions of the Board at any time.

WITNESS our signatures this__day of_____, 19__.

THE BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 2, ~~WOODWARD~~ COUNTY, OKLAHOMA

By_____
President of Board of Education

_____
The Teacher

_____
Vice President of Board of Education

_____
Board Member

Attest:_____
Clerk of Board of Education

_____
Board Member

_____
Board Member

SUBSTITUTE TEACHER CONTRACT EXPLANATION NOTE

A distinction can be made between two different types of substitute teachers in the light of M.S.123.35, Subd. 5, and the recent Marolt-Chisholm school case.

On one hand, there is the long term substitute teacher who is temporarily filling in for a vacancy which occurs because of the separation of a regular teacher, i.e., illness, resignation, death, discharge, etc., and that such contract must be for less than one school year to prevent continuing contract rights. Such a substitute teacher should never be employed for more than one year.

In the second situation is a teacher who is substituting due to the absence of a regular teacher, the duration of which might well be beyond a year or equal one year, i.e., maternity, military, sabbatical leave, long term leave, etc. This contract may be in excess of one year, despite M.S.123.35, Subd. 5 and M.S. 125.12, as long as there is a bonafide incumbent with continuing contract rights to said position.

Please make the necessary language changes for each contract issued in accordance with the situation for which the substitute is being employed.

MINNESOTA PUBLIC SCHOOL DISTRICT
SUBSTITUTE TEACHER CONTRACT

The School Board of Independent School District No.____ of the State of Minnesota, _____, Minnesota, at a meeting held on the _____ day of _____, 19___ enters into this agreement with _____, a legally qualified and certificated teacher who agrees to teach in the public schools of said district as a substitute teacher according to the following provisions which shall apply and are a part of this contract:

1. Basic Services: Said teacher shall faithfully perform the services prescribed by the school board or its designated representative, whether or not such services are specifically described in this contract, abide by the rules and regulations as established by the school board and State Board of Education, and any additions or amendments thereto, for the salary indicated below, and agrees to teach in the schools of said district as assigned.

2. Duration: (Strike inapplicable paragraph)

a. It is understood that the teacher is contracting to serve in a position as a substitute teacher pursuant to M.S.123.35, Subd. 5, in a vacancy occurring as the result of _____
(i.e., illness, resignation, death, etc.)
of the regular teacher and for a period of less than a full school year. It is understood, therefore, that this contract shall not be subject to the continuing contract law, since the assignment is made as the result of an emergency for a period of time of less than one school year due to the absence of the regular teacher. The substitute teacher herein agrees to serve as a substitute teacher pursuant to the terms of this agreement from _____, 19____ to _____, 19____.

b. It is understood that the teacher herein is contracting to serve in a position as a substitute teacher for a teacher on leave of absence with continuing contract rights to said position and the right to return to said position upon the expiration of said leave of absence. It is understood, therefore, that this contract shall not be subject to the continuing contract law, since the incumbent on leave of absence already has continuing contract rights to said position. The substitute teacher herein agrees to serve as a substitute teacher pursuant to the terms of this agreement from _____, 19____ to _____, 19____, or until the return of the incumbent whichever occurs first.

The incumbent referred to herein is: _____
(Name of the incumbent)

3. Calendar: School year and vacation days shall be those named on the school calendar as adopted by the school board, and the teacher agrees to teach on those legal holidays on which the school board is authorized to conduct school if the school board so determines. In the event a duty day is lost due to school closing for any emergency, the teacher agrees to perform duties on such days in lieu thereof as the school board shall determine.

4. Additional Services: The school board, or its designated representative, may assign the teacher to extra curricular, cocurricular, or other assignments, subject to established compensation for such services which exceed the services authorized in paragraph 1. Said extracurricular, cocurricular or other assignments may be described in paragraph 5 of this contract or letter of assignment, together with a recitation of the compensation, if any, to be paid for said assignment during the term of this agreement. The school board, or its designated representative, may make any additions or amendments to these assignments during the term of the school year as shall be necessary. No continuing contract rights in said extracurricular, cocurricular, or other assignments and compensation shall occur.

5. Special Provisions: (Insert here any other contractual provisions.) In addition, said teacher agrees to perform the following additional services for the additional salary indicated:

a. Additional Service		Additional Compensation
1.	at	$
2.	at	$

b. Other Provisions:

6. In Consideration thereof, the school board agrees to pay said teacher the following salary:

$_____ For basic services

$_____ For additional services as set forth in paragraph 5

$_____ Total salary, exclusive of fringe benefits

Such salary shall be paid as authorized and in such installments as may be determined by appropriate school board regulation. This contract shall be effective only upon signature by the officers of the school board after authorization for such signatures has been taken by the school board in appropriate action, recorded in its minutes.

IN WITNESS THEREOF I have subscribed my signature this _____ day of _____, 19____.

_____
(Teacher)

IN WITNESS THEREOF, in behalf of the school district, we have subscribed our signatures this _____ day of _____, 19____.

INDEPENDENT SCHOOL DISTRICT NO._____

_____
(Chairman)

_____
(Clerk)

Form E Oklahoma Substitution Teacher Contract

Site Code	Fund	Approp. Code	Regular Salary	Account Code	Payroll Code	
Approved Experience	Step		Degree	Salary Schedule Class		Non-Continuing
Verification						

AGREEMENT FOR SUBSTITUTE TEACHER EMPLOYMENT BETWEEN [redacted] SCHOOL DISTRICT AND

_____, SUBSTITUTE TEACHER

(For period less than a school year, specified below, during_____fiscal year, and WITHOUT Continuing Contract provisions.)

It is agreed between Independent School District Number [redacted] of [redacted] County, Oklahoma, herein mentioned as District, and the above named person, herein mentioned as Substitute Teacher, as follows:

District employs Substitute Teacher, subject to assignment, for the period beginning_____and ending

_____

The salary for the temporary employment shall be based on a rate of $_____per day. Provided, that the stipulated compensation shall be subject to any necessary adjustment to be made by the Board of Education of District to bring the total of all agreements of District within the amount of valid appropriations approved for such purpose.

It is expressly agreed between Substitute Teacher and District that this Agreement will not be renewed for the ensuing year and that employment under the terms of this Agreement is not subject to the continuing contract provisions of Title 70, Section 6-101, Subsection E, Oklahoma Statutes.

Executed in triplicate this_____day of_____19____

INDEPENDENT SCHOOL DISTRICT NUMBER 89
OF OKLAHOMA COUNTY, OKLAHOMA

By Robert B. Cheney
Director of Personnel

_____
Substitute Teacher (sign on this line)

Form F Temporary Teacher Contract

Site Code	Fund	Approp. Code	Regular Salary	Account Code	Payroll Code	
Approved Experience	Step		Degree	Salary Schedule Class		Non-Continuing
Verification						

AGREEMENT FOR TEMPORARY EMPLOYMENT BETWEEN [redacted] SCHOOL DISTRICT AND

_____, TEMPORARY TEACHER

(For temporary assignment for a period less than school year, specified below, during_____fiscal year, WITHOUT Continuing Contract provisions.)

It is agreed between Independent School District Number [redacted] of Oklahoma County, Oklahoma, herein mentioned as District, and the above named person, herein mentioned as Temporary Teacher, as follows:

District employs Temporary Teacher temporarily, subject to assignment, for the period beginning_____and ending_____. The normal full term contractual period for the current fiscal year began_____ and will end_____. The salary for the period of temporary employment shall be based on an annual rate of $_____, for a full term, and is computed and paid on the basis of 1/_____of such amount for each remaining day Temporary Teacher can actually render service. Provided, that the stipulated compensation shall be subject to any necessary adjustment to be made by the Board of Education to bring the total of all teacher contracts and agreements of District within the amount of valid appropriations approved for such purpose.

It is expressly agreed between Temporary Teacher and District that this Agreement will not be renewed for the ensuing year and that employment under the terms of the agreement is not subject to the continuing contract provisions of Title 70, Section 6-101, Subsection E, Oklahoma Statutes.

Executed in triplicate this_____day of _____, 19_____

INDEPENDENT SCHOOL DISTRICT NUMBER 89
OF OKLAHOMA COUNTY, OKLAHOMA

By Robert B. Cheney
Director of Personnel

_____
Temporary Teacher (sign on this line

Form G Extra Duty Provision

Site Code	Fund	Approp. Code	Regular Salary	Account Code	Payroll Code	
Approved Experience	Step		Degree	Salary Schedule Class		Month
Verification						

TEACHER'S CONTRACT BETWEEN [redacted] SCHOOL DISTRICT AND

_____, TEACHER

(For period beginning _____ and ending _____ with annual salary of $_____ during fiscal year, and with Continuing Contract provisions.)

It is agreed between Independent School District Number [redacted] of [redacted] County, Oklahoma, herein mentioned as District, and the above named person, herein mentioned as Teacher, as follows:

District employs Teacher, as a teacher, subject to assignment, for the period and at the annual salary (which shall be subject to all conditions herein stipulated) designated above. The stipulated salary shall be subject to any necessary adjustment to be made by the Board of Education of District to bring the total of all teacher contracts and agreements of District within the amount of valid appropriations approved for such purpose. The regular earned compensation or salary of Teacher will be paid approximately each two weeks. For each day's unexcused absence from duty there will be deducted _____ of the total compensation. However, under the terms of this contract, no duties shall be expected or required of Teacher in excess of _____ days.

Teacher agrees to faithfully perform all duties and services assigned to Teacher and to faithfully conform to all present and future Rules, Regulations and Personnel Policies of the Board of Education of District.

If, while this contract is in effect, Teacher is given an "extra duty" assignment, in writing, then Teacher shall be paid additional compensation during the school year of the assignment in the amount and at the time or times specified therefor in the "extra pay" schedule of District for the assignment. An "extra duty" assignment, stated in writing, shall be only for the school year stipulated in the assignment, and shall not continue for the ensuing year, unless written notice is given by District that the "extra duty" has been reassigned to Teacher for the ensuing year.

If, while this Contract is in effect, Teacher is relieved from assignment to regular teaching duties and is assigned to a special program(s) of District, then, during the period of such assignment, the compensation of Teacher shall be in accordance with the salary schedule for other teachers employed for such special program(s) and Teacher [illegible]

[illegible]

This Contract shall be subject to the "continuing contract" provisions of Title [illegible] and shall remain in force and effect from year to year [illegible]

[illegible] tion to Teacher advising the annual salary and the beginning and ending dates of Teacher's services in each year. Payment of Teacher's salary for a year shall be in accordance with Teacher's previously selected pay plan unless Teacher has given written [illegible] to the deadline specified in the box below designated "Option Pay Plan."

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Form H- Duncan's Teacher's Contract

TEACHER'S CONTRACT FOR DUNCAN PUBLIC SCHOOLS

INDEPENDENT DISTRICT NUMBER 1, STEPHENS COUNTY, DUNCAN, OKLAHOMA

This contract is made and entered into by and between Independent School District Number 1, Stephens County, Duncan, Oklahoma, party of the first part (hereinafter referred to as the Board,) and _____, party of the second part, as authorized and required by Title 70, Oklahoma Statutes, Section 6-101.

WITNESSETH: That said Board does hereby employ the second party in the DUNCAN PUBLIC SCHOOLS in the capacity of teacher (if otherwise, specify here _____) for the 19___-___fiscal year. The term of this contract shall be for a period of _____months beginning _____, 19___, and ending _____, 19___.

The Board agrees to pay the party of the second part an annual salary of $_____payable in twelve equal monthly payments with the first payment being made near the end of the first month (approximately four weeks) following the beginning date of the contract period as specified above and continuing in a like manner each succeeding month with the provision that the last installment of said salary shall not be payable until the second party shall perform all duties to the assigned position for the full school term. It is further understood that nothing in this contract shall be interpreted as obligating the Board for expenditures in excess of the revenues available and provided for this fiscal year.

The calculation of salary for the term of this contract is as follows:

Salary Schedule as teacher with _____Years Experience (Including approved Military) and the _____Degree----- $_____

PLUS Pay for Extra Duties or Assignments as Listed Below:

_____----- $_____

_____----- $_____

_____----- $_____

_____----- $_____

_____----- $_____

_____----- $_____

TOTAL CONTRACT SALARY FOR THE TERM OF THIS CONTRACT---- $_____

The party of the second part agrees to carry out the following obligations:

1. To accept the work and perform the duties assigned by the Superintendent and Principal, realizing that assignments will be made in an effort to provide the best possible educational program for the youth of this community.

2. To observe all rules, regulations and policies of the Board, the Superintendent, and the Principal under whose supervision he (or she) is placed.

3. To make all reports that are called for by the Superintendent, the Principal, and the Board, and to cooperate with school authorities and co-workers in all cases, or to resign, if he (or she) cannot cooperate.

4. To be in the building where he (or she) is to work during the hours designated by the Board unless previously excused by the Principal of the building.

5. To attend all teachers' meetings called by the Superintendent and Principal.

It is further agreed that, "Upon hearing as hereinafter provided any teacher may be dismissed at any time for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude."--Title 70, Oklahoma Statutes, Section 6-103. And if said teacher shall be dismissed or discharged by said Board before the expiration of this contract as provided above, or if said teacher shall have his (or her) certificate legally annulled, by expiration or otherwise, then said teacher shall not be entitled to compensation from and after the date of notice of dismissal or annullment of certificate.

It is further agreed that, "Whenever any person shall enter into a contract with any school district in Oklahoma to teach in such school district the contract shall be binding on the teacher and on the Board of Education until the teacher legally has been discharged from his teaching position or released by the Board of Education from his contract. Until such teacher has been thus discharged or released, he shall not have authority to enter into a contract with any other board of education in Oklahoma for the same time covered by his original contract."--(Title 70, Oklahoma Statutes, Section 6-101 (E).

It is further understood that, "If prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified him in writing by registered or certified mail that he will not be employed for the ensuing fiscal year, and if, by April 25, such teacher has not notified the Board of Education in writing by registered or certified mail that he does not desire to be re-employed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis."--(Section 80-e, School Laws of Oklahoma, 1971).

It is further understood, that if the teacher does not notify the Board as specified above by April 25, the Board must reserve a teaching position for said teacher, and said teacher will be expected to comply with both the written terms of this contract and the terms of the continuing contract law fulfilling their duties to the Board of Education for the period specified.

"Any teacher...reported to have failed to obey the terms of his contract previously made and to have entered into a contract with another board of education without...being released from his former contract...(shall)... upon being found guilty of said charge at a hearing...before the State Board of Education,...have his certificate suspended for the remainder of the term for which said contract was made."--(Section 70, Oklahoma Statutes, Section 6-101 (D).

In witness whereof, we have subscribed our names this _____ day of _____, 19___.

FOR INDEPENDENT SCHOOL DISTRICT NUMBER 1 OF STEPHENS COUNTY, OKLAHOMA:

_____
Superintendent

_____
Teacher

President of Board _____

ATTEST: Clerk of Board _____

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Chapter 4

THE POWER TO PROVIDE FOR LEAVES OF ABSENCE

"To Pay or not to Pay"

LEAVES WITHOUT PAY

Personnel leaves of absence without pay are authorized by Title 70 Oklahoma Statutes, Section 5-117, which provides as follows:

> "The board of education of each school district shall have power... to provide for employees leaves of absence without pay;"

Generally, leaves of absence are permissible at the option of the board; but, however, cases have indicated that in the area of maternity leaves, a school district cannot terminate a certified teacher on the basis of pregnancy. Therefore, it would appear that a leave of absence without pay would be mandatory when requested by said teacher.

Other "leaves" might include personal business and sabbatical leaves. Although not specifically authorized by statute, sabbatical leaves are included among the fringe benefits of some school districts. Such provision is intended to be of mutual benefit to the employer and employee. If a "stipend" is paid, which could be included as a condition in the teacher's contract, and then the teacher fails to return to the district, then said stipend should be repaid (note that a condition of sabbatical leave could be returning to the district for a required period,

but such could not be required unless a stipend hung in the balance). (This is not to include such short-term propositions as sick leave, emergency leave and personal business leave as authorized by Title 70 Oklahoma Statutes, Sections 6-104, 6-105).

In a recent decision in Cedar County, Iowa, in Barnett et al vs. Durant Community School District, the District Court rules that the provisions in a teacher's contract providing for a tuition refund are without authority of the Board of Education, and that the provision is null and void.

The Court noted that granting a leave of absence with pay is a gift of public money beyond the power of a school board to accomplish, and that a school board has only those powers as are expressly granted to it by statute, together with those powers that are necessarily implied from the statutes.

The case was brought by 25 teachers of the Durant Community School District for declaratory judgment, declaring that the school district has authority to reimburse them not to exceed $320 for expenses incurred for tuition and furtherance of the teacher's education while under contract with the school district. The question before the Court was solely whether the school board, which had expressed willingness to make payments, had the authority to pay the tuition or reimburse teachers for tuition for course-approved work.

The Court notes in the course of its opinion that:

> "It would be a simple matter to include a reasonable sum in the pay increment to cover the tuition, if in fact, this is not already being done. This would make the reimbursement method obsolete and unnecessary and would have the salutary effect of making the contract legal in this respect."

"FORCED" MATERNITY LEAVE:

We know now in the area of maternity or pregnancy, depending upon your preference of terms, a district cannot force a teacher to take leave at a particular time during the pregnancy state. In this regard, here follows a summary of the recent U. S. Supreme Court decision pertaining thereto.

On January 21, 1974, the United State Supreme Court decided the maternity leave controversy dealing with both LaFleur and Cohen. The Court held as follows:

(1) The mandatory termination provisions of board maternity rules violate the due process clause of the Fourteenth Amendment;

(a) The arbitrary cutoff dates (which obviously come at different times of the school year for different teachers) have no valid relationship to the States interest in preserving continuity of instruction, as long as the teacher is required to give substantial advance notice that she is pregnant;

(b) The challenged provisions are violative of due process since they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties, whereas any such teacher's ability to continue past a fixed pregnancy period is an individual matter; and the school boards' administrative convenience alone cannot suffice to validate the arbitrary rules.

(2) The Cleveland three-month return provision also violates due process, being both arbitrary and irrational. It creates an (irrebuttable) presumption that the mother (whose good health must be medically certified) is not fit to resume work, and it is not germane to maintaining continuity of instruction, as the precise point a child will reach the relevant age will occur at a different time throughout the school year for each teacher.

(3) The Chesterfiled County return rule, which is free of any unnecessary presumption comports with due process requirements.

It is important to note, though, that the Court did hold that required advance notice of the state of pregnancy by the teacher is reasonable, and further that a school board may institute alternative administrative means in

support of the legitimate goals of education. Specifically, boards may demand in each case substantial advanced notice of pregnancy and subject to certain restrictions, they may require all pregnant teachers to cease teaching at some firm date during the last few weeks of pregnancy.

As to re-entry, boards may in all cases restrict (same) to the outset of the school term following delivery, preceded by submission of a medical certificate from the teacher's physician.

Finally then, the Court has held that a school board, in determining such regulations, cannot utilize unnecessary presumptions that broadly burden the exercise of protected constitutional liberties.

QUESTIONS AND ANSWERS:

A. Is a district required to provide leave? Section 5-117 authorized a board to grant leave, but does not require such regulation. Considering the premise, though, that a board cannot terminate an employee pursuant to a justified request for leave, particularly maternity, it would seem, then, that a leave policy be in existence to accommodate the situation.

B. Is there a distinction between tenured and non-tenured personnel as to leave privileges? Case law tells us that if you have a leave policy, then such must be available to all teachers, accordingly, leaves must be applied non-discriminatory and pursuant to promulgated rules and procedures.

C. What about sabbatical leave and other leaves? There may be no such requirement other than that which would normally be expected within the profession, or perhaps, pursuant to a negotiations agreement.

D. Are Boards required to provide positions for teachers returning from leave? Generally, reassignment within the same general grade and area is within the discretion of the board. Granting leave places the board in a difficult position, in that a replacement must be secured and obligations thereto are inherent and statutory; accordingly, the board must then deal with the replacement's expectations, as well as the returning teacher from leave.

The teacher returning is basically entitled to be reinstated as an employee generally within his area of qualification, but not necessarily to the same exact position as he held before, subject to reassignment. As to salary, such cannot be reduced unless appropriate duties are removed (such poses an additional problem as to if and when additional duties calling for extra wages can be eliminated - a leave situation would further complicate the issue).

E. Must a teacher provide notice prior to April 25 as to returning or may a Board require notice of returning prior to April 10? "Notice" is critical herein, in that the departing teacher must have knowledge as to what the future holds. At the same time, the board is

entitled to know what the future holds and should be able to expect timely notice of return prior to a date certain within the current school year preceding the year returning. Percentages tell us that the great majority of teachers who take leave never return. If this be the case, then why should a board be "over-obligated" to that teacher to the detriment of the system? On the other hand, that teacher who will, in fact, return, is entitled to certain considerations if he complies with notice requirements and other information as requested by the board. It is therefore extremely important that all positions as to the leave status be clearly defined prior to commencement of same and every protection be afforded all parties, to-wit: the district employer, the employee on leave and the replacement employee.

F. Is a "duration of Need" contract legal and if so, is notice still required by April 10? The only authorized method of employment of teachers is by way of written continuing contract. A "duration of need" contract is not authorized under the law and the teacher replacement must be dealt with in accordance with those privileges of notice, etc., (just as any other teacher would be entitled.) Accordingly, it is critical that the teacher on leave provide timely notice prior to April 10 as to his intentions of returning so that the teacher replacement may receive his "timely notice."

PROPOSED POLICY OF BOARD OF EDUCATION REGARDING PERSONNEL LEAVES OF ABSENCE WITHOUT PAY:

Pursuant to Title 70 Oklahoma Statutes, Section 5-117, the _____School District Board of Education has the authority to provide for personnel leaves of absence without pay. Accordingly, the following policy is adopted this _____day of_____, 19_____.

A. Any employee desiring leave of absence without pay shall file an application with the Office of the Superintendent with a copy to that employee's building principal no later than March 1 of the school year for leave to commence the ensuing school year. Said application shall include the commencement and concluding dates of said leave period and further relate the need (or reason) for such leave period. The Superintendent will attach his recommendation thereto and the employee will subsequently be notified of Board action by registered or certified mail. All leave requests, with the exception of those specifying "maternity" which will be automatically approved, will be determined on their merits, but the Board is not obligated to approve any leave request other than "maternity."

B. The employee so requesting leave and having same approved is required to provide written notice by registered or certified mail to the Office of the Superintendent no later than March 1 of the school year preceding the school year of return relating the employee's intentions as to

returning. If such notice is not so received, then it will be presumed that the employee does not desire to return.

C. All reinstatements will be subject to a like position being available in the school district with leave of the Board being reserved to reassign said employee within the same general grade and/or area of qualification within any school building in the district. Every possible effort will be made to reinstate said employee.

D. An employee on leave granted by the Board will retain all those privileges of employment attained prior to the leave period upon his return except that leave period shall not be applied to "time in service" as is applicable to the provisions of Title 70 Oklahoma Statutes, Section 6-122.

E. If an employee must request leave to commence during the course of a school year, only that "time in service" so completed will be applied to the employee's record.

F. An employee, whose absences from work, for whatever reason, have become excessive on a continuing basis, may be placed on automatic leave of absence without pay by the Baord upon proper notice and a hearing, if requested in writing by the employee in question.

G. A normal leave period will be considered as no more than one contract employment year and in case an extension is requested by the employee on leave, then the same procedures as outlined herein must be complied with. Open-ended leaves are not authorized under any circumstances.

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H. In case of leave of absence without pay because of pregnancy, immediate written notice of the Office of the Superintendent is required upon the employee confirming the fact of pregnancy. Such notice will be accompanied by a Doctor's Statement as to the pregnancy fact and health status of the employee. Assuming there are no health complications indicated, the employee is permitted to continue work until four weeks prior to the estimated date of birth. After birth, the employee will be reinstated, subject to availability of position, at the beginning of the ensuing school term, upon the Board receiving proper notice prior to March 1 as outlined herein. Sick leave, pursuant to Tile 70 Oklahoma Statutes, Section 6-104, will only be paid to that employee who (1) has accumulated sick leave; and (2) contracts illness as a result of said pregnancy, pregnancy itself, being a disability and not an illness pursuant to Oklahoma Law.

EMPLOYEE'S LEAVE OF ABSENCE WITHOUT PAY APPLICATION

NAME: _____

ASSIGNMENT: _____

DATE OF APPLICATION: _____

DATE RECEIVED BY SUPERINTENDENT: _____

DATE DETERMINED BY BOARD: _____

I hereby request leave of absence without pay commencing

_____ and concluding _____.

The reason for this request is: _____ maternity*

_____ sabbatical

_____ other
(please explain)

*In case of maternity, please indicate estimate date of childbirth:

_____

Address while on leave: _____

_____

_____
Employee Signature

_____ APPROVED _____ DISAPPROVED

_____ _____
SUPERINTENDENT CHAIRMAN OF BOARD

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LEAVES WITH PAY

Section 83 of the Oklahoma School Code of 1973 (70 O.S. Sec. 6-104) constitutes Oklahoma's sick leave law. Section 84 of the Code (70 O.S. Sec. 6-105) regulates the payments to substitute teachers which, in effect, relates directly to the sick leave provisions. Numerous Attorney General Opinions have been issued over the years relative to sick leave issues.

SECTION 85:

In 1957, it was held that a board of education may, but is not required to, provide health benefits to employees, in addition to sick leave benefits (August 9, 1957). Such provision is now specifically included in Section 83 (A):

> "Each school district shall adopt an appropriate plan to provide for serious illness, death in immediate family or other similar extreme circumstances."

The Attorney General has further held that a board of education cannot provide, within its sick leave policy, payment for unused sick leave during the present fiscal year at termination or retirement; but, the board may provide a "bonus" payment for the number of days actually at work by a contract with the teacher, which "bonus" would not affect accumulated sick leave. (Att. Gen. OP 71-166, June 28, 1971)

It should be noted that excluding certain "minimum standards' that will be discussed hereafter, much of the sick leave and substitute policies of a local school district

remain at the discretion of the local board of education. Any sick leave plan so promulgated must be in writing, show the date of approval by the board of education, and be made available to all teachers. (November 15, 1968)

The Attorney General has also previously ruled as to the following:

> (1) a board of education is required to provide a minimum total of ten (10) days of sick leave for each teacher for a combination of absence due to personal illness and illness in the immediate family (October 22, 1971);
>
> (2) it is mandatory that the sick leave plan of the local board of education provide that sick leave is cumulative up to a total of sixty (60) days and there exists no distinction between unused sick leave for personal illness and illness in the immediate family (October 22, 1971).

Section 83 now so provides:

> "The plan shall provide that a teacher may be absent from his duties due to personal illness or illness in the immediate family without the loss of salary for not to exceed ten (10) days during each school year.... Leave shall accrue at the rate of one day or more per calendar month based on a ten-month school year."

Based on the included provision "unused sick leave shall be cumulative up to a total of sixty (60) days..." there appears to be a direct conflict within the language of Section 83. Such states a teacher may exercise his sick leave "for not to exceed ten (10) days during each school year," but then permits accumulation up to sixty (60) days, which conceivably, could all be taken during the course of one school year; if not, then what would be the purpose of

the accumulations? It should further be noted that the sixty (60) day stipulation is a mandatory "minimum" and a school district is permitted (and many do) to provide more than sixty (60) days. The Attorney General has specifically ruled that a board provide no less than 10 days sick leave per annum (October 28, 1966) and that a sick leave plan cannot provide 10 days automatically at the beginning of the school year (May 1, 1972). The statutory language is somewhat confusing as it stated "sick leave shall accrue at the rate of one day or more per calendar month..." Concievably, a district could permit ten days to accrue in one month, but if so, no further leave could accrue that year because of the ten day maximum per year provision. Obviously, the provision "or more" was to so permit a district to grant the additional days to assist in the recruitment and retention of highly regarded teachers.

The local board of education may provide up to a maximum of five days of paid emergency leave each year, which days shall not be chargeable to sick leave; but the purpose for which emergency leave may be taken shall be determined at the discretion of the local board of education which should be documented in its sick leave and emergency leave plan. (October 22, 1971) Further, emergency leave is not chargeable to sick leave (October 22, 1971) and the statute now so provides in addition to making such emergency leave non-cumulative.

Section 83 provides for a sick leave policy which is best described as a "guideline" for local school districts, but does include certain mandatory minimum standards.

Section 83 first states that each school district board of education shall provide for a sick leave plan. Such language constitutes a mandatory edict without exception. Pursuant to such a plan, any teacher so qualifying, shall be paid the full amount of his contract salary during an absence from his regular school duties. Any interpretation of what is a "regular school duty" is a determination to be adjudged by the local school board.

Further, salary deductions, after sick leave benefits are exhausted, should be on a 180 day basis (November 15, 1968). A 190 day basis would be permissible as many boards so utilize.

The 1973 Legislature passed a new provision which relaties to sick leave, but exists as that above and beyond any regular school district sick leave plan. Section One of Senate Bill 366 (Section 601) provides generally that a teacher shall be paid his full contract salary for the remainder of the school year when, in effect, he has been injured "in the lien of duty." The provision further subrogates the school district in enabling said district to recoup its loss from the person so causing the injury.

Section 83 no longer provides specifically for "personal Business leave," although it is referred to in Section 84. The Attorney General has ruled that personal business may or may not be considered "emergency leave,"

but such would depend upon the local board's determination, which should be based upon approved documentation.

SECTION 84:

Section 84 provides generally for the employment of substitute teachers when "a teacher is temporarily unable to perform his regular duties." When such a situation occurs, the substitute's pay will be deducted from the regular teacher's salary for those days absent in excess of the local board's sick leave maximum. As clearly indicated by the Code, the usage of a substitute is a "temporary" situation, and accordingly, if the regular teacher continues to be absent for an abnormal duration, then it should be the local board's discretion to place the regular teacher in a "leave of absence" status, after proper notice, and thereafter employ a replacement for the balance of the school term.

Sub-paragraph A limits non-certified substitute employment to a maximum of twenty days.

There has existed a great deal of confusion with reference to the provisions of Title 70 O.S. Section 6-105, Paragraphs A and B. The question that continues to be pondered is whether or not the regular teacher for whom a substitute has been provided, may collect the difference in the amount paid the substitute and the amount regularly paid the teacher. Section 6-105 A provides as follows:

> "If, because of sickness or other reason, a teacher is temporarily unable to perform his regular duties, a substitute teacher for his position may be employed for the

> time of such absence. A substitute teacher shall be paid in an amount and under such terms as may be agreed upon in advance by the substitute teacher, the regular teacher and the board of education or according to regulations of the board. In the absence of any such agreement or regulation, such substitute teacher shall be paid in the same manner and amount as would have been paid the regular teacher, and the amount of the payment shall be deducted from the amount next payable to the regular teacher. Provided, that each reduction shall be only for the time loss in excess of the sick leave to which the regular teacher is entitled. A teacher absent for reason of personal business shall have deducted from his salary by the school district only the amount necessary to pay the substitute."

It is obvious in the case of "personal business", that the teacher is entitled to receive the difference between his salary and the amount necessary to pay the substitute, if there does exist such difference. But in the case where a teacher has exhausted his accumulated sick leave, it does not appear that Section 6-105(A) requires that the regular teacher be paid the difference between this salary and the salary of the substitute.

Title 62 O. S. Section 471 provides that "all public funds of any County or of any subdivision thereof shall be disbursed only in the payment of legal warrants, bonds and interest coupons." Attorney General Opinion #71-166 (June 28, 1971) indicated specifically that unless the Oklahoma School Code specifically provides for a payment to be made, then any such payment so made will be considered illegal. Section 6-105(A) does not specifically provide that the regular teacher is to receive the difference of the amounts paid. Such section does provide, however, that the

substitute teacher shall be paid "in the same manner and amount as would have been paid the regular teacher" in absence of any prior agreement. Based upon the language, "A substitute teacher shall be paid in an amount and under such terms as may be agreed upon in advance by the substitute teacher, (the regular teacher) and the board of education....." it would appear that perhaps pursuant to such an agreement, the regular teacher could receive the difference in amounts, if such is specifically authorized by the board and more appropriately, as a part and parcle of the teacher's individual contract with the employing school district. Otherwise, such a payment would definitely be barred pursuant to the provisions of Section 6-105(A). The teacher is protected by Section 6-105(B) wherein it is provided that no school district shall deduct from a teacher's salary more than the actual amount of money necessary to pay the substitute teacher due to illness of the teacher. Such protects the teacher from having deductions occur in excess of the teacher's daily salary. Here again, a payment of the difference is not specifically authorized.

Attorney General Opinion #73-248 (October 17, 1973) provides as follows:

> "Regular substitute teachers who are teaching in excess of twenty days during a school year and pursuant to a written contract are not required to be paid the minimum salaries and increments required by law to be paid regular classroom teachers of equivalent degree and experience

where there is a regulation or agreement pursuant to 70 O.S. 1971 Section 6-105 providing that less and such minimum be paid."

The foregoing opinion emphasizes the point that absent an agreement to the contrary, the provisions of Section 6-105(A) will be followed specifically and a differentiation of amount should not be paid unless by prior agreement and more appropriately, pursuant to the conditions of employment specifically included within the teacher's contract with the school district in question.

MATERNITY LEAVE V. SICK LEAVE:

To effectually determine the status of pregnant teachers as to employment rights and remedies, an attempt must be made to define exactly what "pregnancy," per se, is. Basically, two extreme arguments exist: (1) pregnancy is an illness and as such, should qualify for sick leave benefits; (2) pregnancy is a disability and should exist as a failure to perform situation pursuant to the teacher's employment contract. Closely related arguments are those related to a physiological condition and further, an incapacitated state of condition.

As to the defining the art of "pregnancy" it is clear that pregnancy does exist as a "condition" (State V. Sudol, 129 A.2d 29, 32, 43 N. J. Super. 481, State V. Comer, 132 A.2d 325, 329 45 N. J. Super. 236). An Oregon case has further said that pregnancy is definitely not a disease or an injury (Carter V. Howard 86 P.2d 451,455, 160 Org. 507).

Normally, pregnancy is treated as a separate condition pursuant to normal hospitalization and life insurance policies (John Hancock Mutual Life Insurance Co. V. Serio, D. C. Municipal Appellate, 176 A.2d 874, 876). An earlier case indicated that pregnancy was not per se, a condition of unsound health, disease or ailment within the meaning of such terms in a policy providing for payment of disability benefits. (Lee V. Metropolitan Life Insurance Co., 186 S.E. 376, 382, 180 Sup. Ct. 475).

On the other hand, "sick leave" has been broadly defined as leave of absence from duty granted on account of sickness, injury or disability, (Nelson V. Dean, 168 P.2d 16, 27 Cal. 2d, 873, 168 ALR 467). More specifically, the word sickness, has been held to not necessarily include pregnancy (Mutual Benefit Health & Accident Association V. United Casualty Co. CCA Mass. 142 F.2d 390, 394). An extremely old case held that an able bodied woman who was pregnant was not sick within the meaning of the statute in question. (Regina V. Huddersfield, 7 EL, BL 794, 796). More recently, under a professional disability policy providing indemnity for loss of time caused by sickness, pregnancy and confinement for delivery per se, could not be construed as sickness within the intent and meaning of the policy. (Sullivan V. National Casualty Co., 125 N. Y. Supp. 2d, 850). The only exception therein would be a case where the pregnancy itself was complicated, or carried unusual and disabling consequences and as such, could be viewed as a sickness within a professional disability policy. (Sullivan V. National Casualty Co.,

128 N. Y. Supp. 2d., 717, 283 Appell. Div. 516). Such case citations would generally make clear that the state of an "uneventful" pregnancy would not so qualify as sick leave.

The Oklahoma School Code specifies that sick leave includes "personal illness or illness in the immediate family. Accordingly, the issue has risen as to whether or not time absent due to pregnancy is so covered. Maternity leave is not specifically provided for in the Oklahoma School Code, but could be included in Section 83's catch-all language of "Each school district shall adopt an appropriate plan to provide for.... other similar extreme circumstances." Further, a basis of sick leave is found in 70 O.S. 5-117, which states:

> "The board of education of each school district shall have power... to make rules and regulations not inconsistent with the law... to contract with and fix the duties and compensation of... teachers... <u>to provide for employees leaves of absence without pay...</u>"
> (emphasis added)

There does exist the argument that pregnancy constitutes an illness and thereby, a school district's sick leave plan should provide adequate relief for the pregnant teacher. A teacher in Pennsylvania alleged such a position in light of a board regulation which required the teacher's <u>resignation</u> following the end of the fifth month of pregnancy. Instead of a "leave" policy the district argued that maternity leaves have proven to be unsatisfactory in that many teachers on maternity leave had failed to return as the board expected,

thereby creating a shortage of teachers at a critical time. During the course of the testimony given, a medical expert testified as follows:

> "A. Well, the current thinking is that pregnancy is a physiological condition and not an illness, and we encourage patients to carry on their normal activities throughout the entire pregnancy.
>
> Q. Is this your personal view point?
>
> A. This is not only my view point, but the view point in the field of Obstetrics and Gynecology in general."

The Pennsylvania Court relied heavily on a prior Pennsylvania decision which held that a teacher who was incapacitated by virture of pregnancy was not entitled to sick leave and could be required to resign. (Cerra V. E. Stroudsburg Area School District, 285 A.2d 206 (Penn. 1971)

A Virginia Federal Court decision (Cohen V. Chesterfield County School Board, 465 F_2 1184 (6th Cir. 1972) indicated that pregnancy should be treated with "any other medical condition," thereby inferring that pregnancy could possibly be categorized as sick leave. New York (Staten V.E. Hartford Bd. of Ed., FED 6-34-1 USD C S.D. N. Y. 1972) and Illinois (Bravo V. Bd. of Ed., 41 USLW 2029 U S D C N.D. Ill.) have also concurred.

Logically though, state law should control and Oklahoma, by virtue of Section 5-117 (providing for "absence without pay"), and further, because Section 83 (restricting sick leave to "personal illness" and "illness in the immediate family") appears to separately classify maternity leave from sick leave.

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A D D E N D U M

On the 17th day of June, 1974, the United States Supreme Court rendered a decision dealing with the paymert of benefits for disabilities attributable to pregnancy. In a 6-3 decision, with Justice Stewart delivering the majority opinion for the court in Geduldig v. Aiello, 42 L.W. 4905, (June 18, 1974) the court held that a State is not required by the equal protection clause to sacrifice the self-supporting nature of a program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution rate, just to provide protection against another risk of disability, such as normal pregnancy. In this case, arising out of California, the State's decision not to insure under it's program the risk of disability resulting from normal pregnancy was held not to constitute an invidious discrimination violative of the equal protection clause. More specifically, the court held as follows:

> "The equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all."

This means that, contrary to the opinion of teacher groups over the past few years, a school district is <u>not required</u> to pay sick leave or provide other disability benefits pursuant to the status of pregnancy. A State may choose not to insure <u>all</u> risks involving employees. The Supreme Court held that there is no risk from which men are

protected and women are not. Likewise, there is no risk from which women are protected and men are not. Although the court did not touch on the "voluntary" aspect of pregnancy as opposed to other disabilities occuring on an involuntary basis, it does appear the court recognized the unique aspect of pregnancy. In foctnote 20, the court indicated that normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretext designed to affect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this, on any reasonable basis, just as with respect to any other physical condition. The court further pointed out that the program in question divided potential recipients into two groups, pregnant women and non-pregnant persons. While the first group (pregnant women) is exclusively female, the second (non-pregnant persons) includes members of both sexes. Accordingly, the physical and actual benefits of the program in question accrued to members of both sexes.

The idea of additional financial strain was inherent within the court's opinion, although not determinative of its decision. The argument in opposition to the court's final determination was that the program in question could always increase his contribution rates. (The court set aside this argument in saying that even if such was possible, such would not be reasonable under the circumstances as obviously the

extensiveness of this additional contribution could not [controllable] otherwise.)

The Geduldig decision now settles the long standing argument as to whether disability payments are applicable to the status of pregnancy. Conclusively, the United State Supreme Court has clarified both aspects of the pregnancy problem, the first being the earlier decision regarding the unconstitutionality of forced maternity leave and now the constitutionality of withholding disability benefits for those who prefer to assume leave situations during the pendency of child birth.

Chapter 5

THE POWER TO CLOSE SCHOOL BOARD MEETINGS

"When In Doubt...Let the Everloving Sun Shine In"

A recent Denver District Court decision has raised some questions regarding the legal propriety of a board of education holding closed meetings. In the past, the common law has upheld the right of boards of education to conduct their meetings in whatever fashion they deemed proper, except when limited by statute. For example, Colorado's statute appeared to limit a board's discretion only to the extent that no final policy decisions could be made in an "executive session." Notwithstanding the statute, the Denver District Court imposed a more restrictive requirement upon boards of education. The decision apparently recognized the informational matters and administrative and executive matters which do not require public involvement and which may be considered by the board of education in a closed or informal session. Also, the decision gave credence to certain secret matters related to a regular or special meeting of the board of education which may be considered by the board as an "executive session." But, the court indicated that other matters involving the consideration, discussion and formulation of policy must be conducted in open public session.

Oklahoma does have "sunshine", otherwise known as the "open meeting law. Title 25 of the Oklahoma Statutes, Section 301 provides in part as follows:

> "All meetings of the governing bodies of all municipalities located within the State of Oklahoma, boards of County Commissioners of the Counties in the State of Oklahoma, Board of Public and Higher Education in the State of Oklahoma and all other boards, bureaus, commissions, agencies, trusteeships or authorities in the State of Oklahoma supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public properties, must be public meetings, and in all such meetings the vote of each member must be publicly cast and recorded.
>
> "Executive sessions will be permitted only for the purpose of discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any public officer or employee; provided, however, that any vote or action therein must be taken in public meeting with the vote of each member publicly cast and recorded. Any action taken in violation of the above provisions shall be invalid."

It has been said that Section 201 (Section 525 of the Oklahoma School Code) "defies interpretation." Section 202 of the Oklahoma Statutes provides for a misdemeanor penalty for the violation of Section 201. Penalties will be discussed at a later point in this chapter. Section 201 was originally enacted in 1959 and amended in 1967. However, the penalty provision was also enacted in 1959 but was not amended with the 1967 Section 201 amendment.

The Attorney Generals of the State of Oklahoma have interpreted this piece of legislation six times, with the earliest opinion given June of 1968, and the latest on May of 1974. Initially, we will look into each of these opinions issued so as to make an attempt to interpret Oklahoma's sunshine law. Presently, there is no case in point interpreting Section 201.

The first Attorney General opinion held that the University of Oklahoma faculty senate was not a governing body within

Section 201 (Opinion No. 68-231, June 27, 1968).

The second opinion (Opinion No 69-350, January 15, 1970) extensively construed governing body, governor's communications, and constitutional conflicts. It held the following:

1. Under Section 201 construed "a meeting of the governing body" to mean a quorom of the collective number of individual members of a governing body to transact the business which officially concerns such body;
2. Under Section 201 the governor may privately communicate with members of a public body so long as the individuals are not meeting as the governing body;
3. Constitutional Article 13(b) Section 1 relating to the board of regents of Oklahoma Colleges and executive board meetings, does not supersede the provisions of Section 201 which requires meetings of governing bodies to be open to the public;
4. Section 201 permits closed sessions for the purpose of discussing termination of employment.

The third opinion (Opinion No. 71-245, April 12, 1972) construed questions relative to federal funds to support local boards, subordinate agencies, private nonprofit corporations, and inter-board communications. Excerpts of this opinion relating to the open meetings law are as follows:

1. Groups, committees, advisory boards or other subordinate agencies created by a governing board or authority or other agency is subject to the provisions of the open

meeting law because any governing board or subagency which is supported in whole or part by public funds would so be subject;

2. Private non-profit corporation created for the purpose of leasing public land or property for public use would be subject to the open meeting law;

3. Federal funds used to support local boards becomes public money once it is received by those boards. It therefore follows that such boards then become subject to the open meeting law;

4. Communication between individual members of such governing bodies when not meeting as a governing body may be private.

Very quickly in September of 1972, came Attorney General No. 72-233 (September 29, 1972) which held the open meeting statute to be applicalbe to meetings of local boards of education when they discuss collective employment matters. According to the opinion, the open meeting statute will be applicable to meetings held by a bargaining subcommittee or agent designated by the local board of education if the subcommittee or agent is given delegated power to decide the terms of employment contracts.

A 1973 opinion (Opinion No. 73-154, May 31, 1973) held the Professional Practices Commission to be excluded from the open meeting requirement when facts show it does not spend public funds or administer public properties. Otherwise, if facts show public funding or administering, the PPC hearings are required to be open to the public, with the exception of allowing individual hearings to review the non-renewal of teaching contracts pursuant to Title 70, Oklahoma Statutes, Section 6-122 as amended.

The latest Attorney General Opinion on the subject has placed a prohibition on the board of education in discussing student disciplinary matters or conducting student disciplinary hearings in executive session (Opinion No. 74-113, May 31, 1974).

From the foregoing opinions, it is clear the Attorney General's Office has approached Section 201 in a very liberal manner with respect to basic prohibition and in a conservative manner with respect to executive session exceptions. This author notes his approval of the opinions since the public has a right to observe duly elected or appointed officials in action and to watch over public expenditures. He further notes there is a tendency on part of the media to make no exceptions to the open meeting law. The author says, "When in doubt, let the everlovin' sun shine in."

There have been several unsuccessful attempts by the Oklahoma Legislature to amend Section 201 to exclude from the open meeting requirement considerations of negotiation proposals pursuant to Oklahoma's Professional Negotiation Act. According to a majority of labor law experts, such negotiations require closed meetings. Another amendment attempt failed to change the law relating to student disciplinary matters. Presently, there is a lawsuit pending which challenges an Attorney General's Opinion on the open meeting requirement for negotiation discussions. The plaintiff's argument makes an analogy between going into executive session to discuss matters relating to one employee with going into session to discuss matters relating to employee's groups.

Several side issues should be considered when dealing with Section 201. Title 70 of Oklahoma Statutes, Section 6-122 provides for reconsideration by the local board of education in cases where a teacher's contract has not been renewed. This section gives the complaining teacher the right to confront and cross-examine his accusers. Since the word "hearing" never appears in this section, the question arises as to whether the local board of education may go into executive session to conduct this proceeding and whether his counsel, or representative, may remain with him. Section 201 only permits closed session for discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any public officer employee. There are no guidelines as to how Section 201 and Section 6-122 interrelate. The school districts are not subject to the administrative procedures act and they do not have the power to subpoena. Furthermore, this reconsideration meeting is informal, thus giving the teacher the opportunity of confrontation.

Consider Attorney General Opinion 73-154 which is stated as follows:

> "it would seem that hearings conducted under 70 O.S., 1971, Section 6-122, as amended relative to the non-renewal of a teaching contract would be within the personnel exemption."

Commonly, executive sessions are uniformly permitted for proceedings related to personnel management. Where an individual's case is concerned, respect for personal privacy is an important factor. The interested citizens "need to know" is not so critical. The interested citizen will have ample opportunity to judge the

performance of his public officials so long as he has adequate access to the official proceedings and actions. In the re-consideration of a non-renewal of a teacher's contract under Section 6-122, however, the board of education is merely deliberating prior discussion and evidence concerning employment. The question is can the board hold an executive session with regard to the total reconsideration.

Another Attorney General Opinion interpreting the personnel exemption from the open meeting law is stated:

> "By necessity the discussion of employment and appointment includes and relevant discussion concerning the commencement, continuation or termination of employment or appointment."(Opinion No. 68-231)

If an employee does not demand an open hearing, has there been a waiver of his right to demand one at a later time? In a 1972 Federal case, plaintiff requested an open and public hearing of his appeal to the commission for reinstatement to his federal employment. Such request was denied. In his appeal, the Federal District Court held due process required plaintiff be given an open and public hearing and enjoined defendant from holding closed sessions. The Court of Appeals affirmed the lower court ruling, but stated that this consideration is of no validity when the plaintiff makes his first objection to a closed session as an appellate. Inferentially, it could be said it is possible to waive an objection to a closed meeting if not timely made. (See Fitzgerald v. Hampton, 467, F.2d 755)

There is a question of standing as to complaints for violation of Section 201. It is clear from the wording of the statute that the press and interested citizens have an interest

in having open meetings. Therefore, it could be argued the standing requisite for filing a complaint for violation of this section is pretty broad.

An executive session is permitted so long as no final decisions are made at that time. Section 201 provides that any action taken in violation of the provisions shall be invalid. This word is distinguished from "void" which is final and not curable. Final action taken in public pursuant to Section 201 has been held cure any defect of interim meettings. Therefore, as long as no vested rights have been affected by holding an executive session, if the discussion began in executive session but "final action" occurred in public, the public hearing will cure the defect of the Section 201 violation.

In a Massachusetts case, Pierce v. School Committee of New Bedford, 322 F. Supp. 957 (1971), the court held there was no Constitutional violation when a school committee held an executive session and denied a student's readmission to school for his disorderly conduct. The court further held there is nothing in the United States Constitution which grants a right to either a recording of the hearing by stenographic means and/or a public hearing. In this case, Massachusetts had a statute which allowed executive session on matters if made public might adversely affect the reputation of any person. The Pierce case somewhat limited the Constitutional allegations for lack of a public hearing. It is further t pattern of extreme judicial reluctance to nullify otherwise sensible action taken in a proceeding which only technically violates open meeting legislation. This is somewhat considered as justice and equity whereby no bad faith

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was intended and at most, there is only a technical violation of the law which did not really prejudice the rights of any parties involved.

Perhaps boards of education and other governing bodies should commence to meet in open "playground" or perhaps on the 50-yard line of the football stadium where there are no doors. The right to privacy is an important constitutional premise and one which cannot be overlooked nor neglected. In this sense, governing bodies tend to leave themselves open to possible litigation on a personal liability stage if they subject participants appearing before them to the pbulic eye relative to matters which the public really has no "need to know". Such is particularly vital to minors, if not more so, to personnel. Regardless, Section 201 must be dealt with and as indicated earlier, this author would always recommend "if in doubt , let the everlovin' such shine in."

Chapter 6

THE POWER TO SUSPEND STUDENTS

"Student Procedural Due Process: Revisited"

> "It can hardly be argued that..... students.....shed their constitutional right to freedom of speech or expression at the school house gate." Tinker V. Des Moines Indiana Community School District, 89 Sup. Ct. 733 (1969).

In my book, Oklahoma Schoolhouse Law, p. 75 (O.U. Law Center 1973) (see also Section 2.4 p. 76) of OSL for a discussion of Oklahoma Suspension Statute section 101 of Title 24 (317), it was stated that "the right to attend school should not be deprived without just cause." Such exists as the premise by which court decisions now tell us, pursuant to Tinker, and more earlier, Dixon, certain procedural due process requirements are in fact required, of which constitute the following:

1. The student must have prior knowledge of the conduct which is required of or prohibited to him;

2. He must be aware of the specific matters giving rise to any proposed penalties or discipline;

3. He must have had some opportunity to express or convey to the decision making authority his views or rebuttals regarding the incident;

4. The decision making authority must base his decision on the incidents or matters about which the student has been apprised as indicated above.

More recently, local District Courts have followed the edict handed down in Pervis V. LaMarque ISD, et al., 466 F2d 1054 (5th Cr. 1972) where in the Court held as follows:

> "It is a violation of procedural due process in failing affirmatively to require a hearing prior to imposition to a suspension."

The Court did state that the quantum and quality of procedural due process to be afforded a student varies with the seriousness of the punishment to be imposed. The U. S. Constitution requires only that the rules and regulations promulgated by school authorities be drawn with the necessary precision to require a hearing when the punishment to be imposed is serious enough to warrant such. In Williams V. Dade County School Board, 441 F.2d, 299 (5th Cr. 1971) the same court indicated that any suspension in excess of ten days was serious enough to warrant enough Dixon-like procedures, In the Dixon case, it was held that a student must be given a fair hearing before he may be expelled from school. Amongst the basic guarantees allowed was the right to be heard in one's own defense and the right to be given notice of the charges. The court indicated that it was basic, that punishment not be imposed before a hearing is provided. Further, it appears clear from Pervis, that the student and his parents must

be clearly advised as to his right to a hearing and/or to an appeal of said decision, somewhat akin to the imposition of Miranda rights as applicable in criminal proceedings.

The Dixon case emphasized that education today is considered a legal right which cannot be denied without adequate reasons and proper procedures. Courts now, essentially require that students be accorded minimum standards of due process of law in disciplinary procedures that may terminate an expulsion. Minimal standards include:

1. An adequate notice of the charges against the student;
2. Evidence to support those charges;
3. A fair hearing;
4. A decision supported by the evidence.

It is also clear, however, that no procedural model is particularly required. The hearing itself, in its procedure thereto, will vary depending upon the circumstances of the particular case, Davis V. Ann Arbor Public Schools, 313 F.Supp. 1217 (Mich. 1970).

In a second Circuit Case, Ferrell V. Joel, 437 F.2d 160 (2d Cir. 1971) the Court described the application of due process as follows:

> "Due process.....varies according to specific factual context, we believe that in.....school discipline cases the nature of the sanction

> affects the validity of the procedure used in imposing it.....expulsion would be at one extreme. Near the end of the other might be a penalty of staying after school for one hour....; in such an instance, written notice and cross-examination of adverse witnesses would require inappropriate time and effort."

Accordingly, it appears that summary suspensions, possibly those not exceeding ten days, and more accurately, those not exceeding three days, are premissible. There does exist, however, a discrepancy amongst decisions as to what exactly constitutes a summary suspension as to the suspended time involved. Basically, a summary suspension can be defined as one, self-contained and short. Courts have viewed such suspensions as minor disciplinary penalties not requiring procedure of notice and hearings. In Lynnwood V. Board of Education of Peoria, 463 F.2d 763 (7th Cir. 1972) Cert. Denied, 409 U. S. 1027, the Court of Appeals held that students may be suspended without a hearing for seven days or less for reasonably prescribed conduct. The 8th Circuit has upheld a five day suspension summarily (Tate V. Board of Education of Jonesboro, Arkansas, 453 F.2d 975 (8th Cir. 1972) Cert. Denied, 409 U. S. 1027, the Court of Appeals held that studens may be suspended without a hearing for seven days or less for reasonably prescribed conduct. The 8th Circuit has upheld a five day suspension summarily (Tate V. Board of Education of Jonesboro, Arkansas,453 F.2 975 (8th Cir. 1972) and finally, the 5th Circuit

has restricted a summary suspension to a three day period, but has approved earlier decisions upholding ten-day summary suspensions, Dunn V. Tyler Independent School District, 460 F.2d 137 (5th Cir. 1972).

In Sullivan V. Houston ISD, 472 F.2d 1071 (5th Cir. 1973) the court stated that the facts of a particular student disciplinary case may demonstrate that a school official's involvement in the incident in question, is such as to preclude his affording the student an impartial hearing. The court did state though, that a procedural defect in an initial hearing before school officials, can be cured by subsequent hearings. The court however, does tend to say that during said procedures, the student should not be put in a position of exculsion until a fair and impartial hearing has been had and any applicable appeals have been exhausted or waived.

The general exception to prohibition of immediate exclusion is when the school can be considered to be in "the throws of a violent upheaval" and/or where such could be considered a detriment to the well being and safety of either the student involved and/or other students within the school. An immediate exclusion rule can then be applied so long as every effort is made to fairly determine the matter within a short period of time after immediate exclusion has been effected.

Obviously, procedures must be set down to cover the foregoing. Any procedure, however, would be totally useless and inapplicable if not first, the school district has promulgated, adopted and approved a sound and reasonable set of student regulations of which would be to provide notice to said students and create subjectively to eventual procedural steps so dictated.

The parents and patrons should also receive said "notice."

Although procedural due process requirements have been described as (1) not imposing any particular "model" on the school disciplinary procedure; (2) "due process" being a flexible concept; and (3) should be afforded in a particular case dependent upon the circumstances of the case, non-uniformly of process and procedure has been complained of, and further, the variable aspect of the eventual punishment so levied has not necessarily met the doctrine of "equal protection."

School offenses will range from "smoking on the school grounds" to "possession of dangerous substances," the latter being normally considered to be the more serious of the two. Accordingly, compare a student's record of six "minor" offenses with that of one "major" offense. Is one major offense sufficient for explusion? Such is a difficult question to answer, but certainly, students and their parents are entitled to a classification

system accurately defining those "major" offenses and/or indicating a "series" of incidents within a particular term mandating the extreme penalty of expulsion from school. Certainly, at the time of final determination, any or all offenses that relate to the possible penalties should be included within the notice containing the charges of discipline problems.

Another student theory is that, the exactness and formality of the procedure so utilized is directly proportional to the seriousness of the sanction that may be imposed. Such is ridiculous and is much akin to the premise where a certain crime can be either a misdemeanor or felony, depending upon the extent of punishment. In such a case, the prosecutor always conducts a preliminary hearing (which is required of all felony cases). If such hearing is not conducted and the jury eventually convicts of a felony, then the accused's due process was violated and the case is easily reversed.

Accordingly, procedures and process should be uniform in every case beginning at the time of the infraction and continuing throughout each appellate remedy available. One day out of school is considered, today, a serious deprival of education as to that particular youngster.

More problems result from "notice" than any other particular procedure. Passing, for the time being, the

rules themselves, the notice of charges and pending punishment is the foundation of any litigation. The district is limited to a presentation of evidence relating directly to what the notice reflects. If the charge states "pulling a knife on another boy," then such constitutes the offense, and the party that had the knife pulled on him would be required to testify in a contested matter. If the charge states "possession of a dangerous weapon," then not only would testimony of possession be required, but proof of whether or not the object is as in fact dangerous, would further be required.

The initial award of punishment should be clear and definite, if possible. For example, does recommended reassignment to another school mean that the student is not actually suspended? Does an assignment to a "special" school dictate punishment or aid? Is there really such a thing as "expulsion?" (Many statutes restrict the amount of forced days absence and accordingly permit return to school after a fixed period).

Oftentimes, the extent of the punishment inflicted is the only question raised by the student. In such a case, the prior "record" of the student should be considered. Further, any stipulations applicable to the actual incident should be determined prior to the hearing. If the student is not contesting the fact of guilt or innocence, then pursuing that line of interrogatory would constitute a waste of time.

Questions have also been raised as to who should conduct and act as the determining authority at the hearing. The fair and reasonable answer would be any person or persons, who have no prior knowledge as to the incident involved. Any such hearing authority merely acts as a fact finder and determines questions just as a jury would in a regular court case. Attorneys who represent students will, however, challenge any hearing authority who is, or works for the school district as being "on the side" of the administration. This is but a "fact of life" and cannot be avoided.

One should always remember that a school can no longer effect disciplinary action against a student unless there exists sufficient evidence to prove the charge made against that student. Teh difficulty of determining the proper evidence relates directly to the regulation at issue.

Consider the following statement:

> "A student shall not knowingly possess, handle, or transmit any object that can reasonably be considered a weapon....."

Such would basically cover the problem of whether or not the "weapon" was actually dangerous (i.e., a water pistol which looks exactly like a real gun and cculd easily cause disruption upon its presence being shown).

Accordingly, the difficulty of sufficiency of evidence would be lessened by properly drafted and promulgated

disciplinary codes.

Finally, a student grievance procedure is a necessity as is any faculty grievance procedure. Written regulations should be adopted defining the basis and substance of all student disciplinary action and such regulations must meet the requirement of "notice" as heretofore emphasized. The written procedure adopted to must constitute fairness, uniformity and contain the aspect of proper timeliness. The constitutional rights of individuals assure the protection of due process of law. Therefore, a system of constitutionally and legally sound procedures must be developed in the administration of discipline of Oklahoma Public Schools.

STUDENT DUE PROCESS RIGHTS

(Applicable to Suspensions in
Excess of These School Days)

1. The hallmark of the exercise of disciplinary authority will be fairness.

2. Every effort shall be made by administrators and faculty members to resolve problems through effective utilization of school district resources in cooperation with the student and his parent or guardian.

3. A student must be given an opportunity for a hearing if he or his parent or guardian indicates the desire for one. A hearing shall be held to allow the student and his parent or guardian to contest the facts which may lead to disciplinary action, or to contest the appropriateness of the sanction imposed by a disciplinary authority, or if the student and his parent or guardian allege prejudice or unfairness on the part of the school district official responsible for the discipline.

4. The hearing authority may request the student and parent or guardian to attempt conciliation first, but if the student and parent or guardian decline this request the hearing authority shall schedule the hearing as soon as possible.

5. The following procedural guidelines will govern the hearing:

   a. Written notice of charges against a student shall be supplied to the student and his parent or guardian.
   b. Parent or guardian shall be present at the hearing.
   c. The student, parent or guardian may be represented by legal counsel.
   d. The student shall be given an opportunity to give his version of the facts and their implications. He should be allowed to offer the testimony of other witnessess and other evidence.
   e. The student shall be allowed to observe all evidence offered against him. In addition he shall be allowed to question any witness.
   f. The hearing shall be conducted by an impartial

hearing authority who shall make his determination solely upon the evidence presented at the hearing.

g. A record shall be kept of the hearing.

h. The hearing authority shall state within a reasonable time after the hearing his findings as to whether or not the student charges is guilty of the conduct charges and his decision, if any, as to disciplinary action.

i. The findings of the hearing authority shall be reduced to writing and sent to the student and his parent or guardian.

j. The student and his parent or guardian shall be made aware of their right to appeal the decision of the hearing authority to the appropriate appellate authority.

STUDENT RIGHTS AND RESPONSIBILITIES
(NSBA Resolution)

The National School Boards Association urges that all local school boards, after involving students, staff, and community and in accord with recent court decisions, establish written policies on student rights and responsibilities. The Association further urges that all local school boards establish due process procedures for the administration of these policies in order that the rights of students and others be protected.

With the foregoing resolution, consider the following Kansas recommendation:

STUDENT COMPLAINTS AND GRIEVANCES
HEARING PROCEDURE
(Kansas Recommendations)

Due Process Guaranteed

Any administrative hearing concerning the suspension or expulsion of students should be conducted in accordance with school board policies which incorporate the following procedural process:

1. The right of the student to have counsel of his own choice present and to receive the advice of such counsel or other person whom he may select.
2. The right of the student's parents or guardians to be present at the hearing.
3. The right of the student and his counsel or advisor to hear or read a full report of testimony of witnesses against him.
4. The right of the student to present his own witnesses in person or their testimony by affidavit.
5. The right of the student to testify in his own behalf and give reasons for his conduct.
6. The right of the student to have an orderly hearing.
7. The right of the student to a fair and impartial decision based on substantial evidence.

Procedural Steps

The chairman of the administrative hearing should forthwith explain the rules by which the hearing will be conducted. These rules should be in writing and

should be handed out to each person present at the hearing. The hearing rules should include the following items:

1. An announcement of the purpose of the hearing.
2. A determination as to whether the student wishes a closed or open hearing.
3. A notation of those present at the hearing in the formal record.
4. A review of the procedural due process as outlined above.
5. A review of the recommendations for an administrative hearing.
6. A review of the procedural steps pertaining to how those persons conducting the hearing will dispose of the findings presented at the hearing.
7. A review of the guidelines pertaining to cross-examination of witnesses.
8. A statement of the adjournment time.
9. A reminder to those present that the law guarantees an orderly hearing and that disturbances will not be tolerated.
10. An announcement that discussion of relevant data and testimony will be guaranteed.
11. An explanation that examination of witnesses called by either party will be conducted in private if the meeting is closed.
12. An outline of the order for presentation of evidence: The school district will present its evidence first, followed by the student and his counsel.

SOURCE: Kansas Association of School Boards (abridges)
DATE: 1971

STUDENT COMPLAINTS AND GRIEVANCES
HEARING PROCEDURE
(Notice to Parents of Hearing
or Proposed Disciplinary Action)

SECTION I--NOTICE

A. Hearing. You are hereby notified that on [day/month/year] at [time] in Room ____ [building/school] a hearing will be held for the purpose of inquiring into and considering the matter referred to in Section II concerning your [son/daughter/ward], [name of student].

B. Disciplinary Action. Based upon the matter referred to in Section II, it may be necessary to take the following action with respect to your [son/daughter/ward].

_____
(Describe proposed action)

_____

_____

C. Purpose of Hearing. The purpose of the hearing will be to give your [son/daughter/ward] an opportunity to hear the charges against [him/her], to present evidence and/or materials in [his/her] behalf, and to bring to bear on the factual issues or on the possible disciplinary action such other factors as [he/she] or [his/her] representative feels are important. In other words, [he/she] will be given the opportunity to "give [his/her] side of the story."

SECTION II--STATEMENT OF REASONS FOR DISCIPLINARY ACTION

_____

_____

_____

_____

_____

_____

_____

SECTION III--WHO MAY ATTEND

I ask that you accompany your [son/daughter/ward] to the hearing. In addition you may bring with [him/her] a representative of [his/her] choice. If you should want a particular teacher, student, or other person present at the hearing, or available, you should contact me promptly so that I can make appropriate arrangements.

SECTION IV--WHO ELSE WILL BE THERE AND HOW THE HEARING WILL BE CONDUCTED

The hearing will be informal. This is not going to be a trial and we will not be in a courtroom. I will preside at the hearing and will begin by presenting the reasons why the proposed disciplinary action is being suggested. At present,it is our intention to have [names and titles] present or available at the hearing. You, your [son/daughter/ward], or [his/her] representative may ask questions of those present and you may then present your own evidence. It is our every intention to see that a fair and impartial hearing is held. If, for some reason, the date or time of the hearing will reasonably cause undue hardship you should contact me immediately so that a new date or time can be scheduled. If I do not hear from you and nobody appears at the hearing in your [son's/daughter's/ward's] behalf, the hearing will be held in [his/her] absence.

If you have any questions, please call me at _____.

Sincerely,

_____
Principal

_____
School

SOURCE: Fort Wayne Community Schools, Fort Wayne, Ind.
DATE: 4/1/70

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Chapter 7

THE POWER TO ADMINISTER CORPORAL PUNISHMENT:

"To Spank Or Not To Spank"

The pros and cons of corporal punishment have been the subject of much debate. The opponents of corporal punishment contend that physical punishment does not enhance learning and is therefore in direct conflict with the objectives of the professional educator. The "thumpum" people, on the other hand, urge the continuation of present policies that permit corporal punishment with safeguards contending that the policy is a necessary part of their role "in loco parentis." In a recent 1970 Gallop Pole, discipline was chosen as the greatest problem of the schools in the respondants' communities, and approximately 50% said that discipline was not strict enough.

In Oklahoma the power to administer corporal punishment is specifically provided by statute. Title 70, Section 6-114 provides:

> "The teacher of a child attending a public school shall have the same right as a parent or guardian to control and discipline such child during the time the child is in attendance or in transit to or from the school or any other school function authorized by the school district or classroom presided over by the teacher."

The doctrine of corporal punishment is further protected in an addendum to the Oklahoma Criminal Code. Title 21, Section 843-844 provides in part:

> "Provided, however, that nothing contained in this act shall prohibit any parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling."

Given the statutory authorization, it is essential for the protection of both the student and the school district that the administration of corporal punishment be controlled. Every Oklahoma school district should have a sound set of rules and regulations which spell out the guidelines for the administering of corporal punishment. One suggestion is to follow the "who, where, why, how and what" rule which provides:

1. Who is to perform or administer the corporal punishment;
2. Where is the corporal punishment to be administered;
3. Why or under what circumstances shall corporal punishment be administered;
4. How or by what instrumentality shall corporal punishment be administered;
5. What would be the requirements as to parental permission and/or the filing of reports pursuant to the administering of same.

Basic requirements as to the administering of corporal punishment include: that the punishment be moderate and reasonable; that it be administered with no malice or anger; and definitely, that no permanent injury should result from the punishment. Another important precept is that "self defense begins where revenge ends." Whether these requirements were met will be a question of fact determined by the circumstances of each particular case. Generally, there is a legal presumption that corporal punishment as administered is moderate and, therefore, the burden is upon the student to rebut the premise. Obviously, the grosser the violation of the requirements, the easier the burden of rebuttal becomes.

Litigation on corporal punishment has been limited. However,

in a recent Federal District Court suit (Ware v. Estes, 328 F. Supp. 657, 1971) the court held that the evidence produced failed to show that a school district policy relating to corporal punishment was arbitrary, capricious, unreasonable or wholly unrelated to the competency of the state in determining its educational policy. Specifically, the Ware case held that corporal punishment is not cruel and unusual punishment and that procedural due process steps as to its administration are generally not required. Further, the case held that corporal punishment may be administered without parental consent, although other jurisdictions, for example, Pennsylvania, have found consent to be required.

Plaintiffs in the Ware case sought to restrain the school district from administering corporal punishment in the Dallas Independent School District without the prior permission of the parent or student on the grounds that it violated rights guaranteed by the 8th and 14th Amendments to the United States Constitution. The rule challenged stated as follows:

> "Principals are authorized to administer any reasonable punishment including detention, corporal punishment, suspension for a period not to exceed ten school days at one time or recommendation for expulsion from school."

The rule permitted delegation of the above duties to the Assistant Principal, but teachers were limited to the use of corporal punishment only. After any corporal punishment had been administered, the principal was required to file a report with the office of the Superintendent. In this particular case, the procedure utilized was the striking of the student on his

buttocks one or several times with a paddle, the size of which was about two feet long, quarter to one-half inches thick and six inches wide. The court noted that the practice of corporal punishment had in fact been abused by some of the teachers in the school district, but held that this does not necessarily show the policy itself to be unconstitutional. The court cited Myer V. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625, 67 L.Ed. 1042 (1922) which held that while the State cannot unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control, these parental rights are not beyond limitation. They further stated the general rule of Pierce V. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 571, 69 L.Ed. 1076 (1924) that in order for a deprivation of due process under the Fourteenth Amendment to occur, the rules and policies of the school district must bear no reasonable relation to some purpose within the competency of the State. It was also noted that Texas permits corporal punishment by statute and the school in question did have a set of rules and regulations/regarding its administration. Basically, the court held that corporal punishment standing alone, does not amount to cruel and unusual punishment; but if at any time it becomes unreasonable or excessive, it is no longer lawful and the perpetrator of it may be criminally and civilly liable since the school policy does not sanction child abuse. In closing, the court cited an infamous statement from Epperson V. Arkansas, 393 U.S. 97, 89 Sup. Ct. 266, 21 L.Ed.2d, 288 (1968):

"Judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint ..... by and large public education in our nation is committed to the control of state and local authorities. Courts do not and cannot interfere in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

In a more recent case, Gonyaw V. Gray, 361, F. Supp. 366 (1973), plaintiffs brought action under the Civil Rights Act to recover damages from the administering of corporal punishment, The court, following the decision in the Ware case rejected the plea and held that the statute in question did not violate the protection against cruel and unusual punishment nor the due process requirement of the Fourteenth Amendment. The court specifically held that:

"Liberty as guaranteed by the Fourteenth Amendment does not guarantee the freedom of a school child from the reasonable imposition of school discipline."

In conclusion, it is important to remember that with right also goes responsibility. Parents generally expect schools to deal with the child's disciplinary problems, but the expectation is that the school will do so in a reasonable and responsible manner.

In formulating a policy concerning the administration of statutorily authorized corporal punishment, the following items should be considered in connection with the previous "who, where, why, how and what rule:"

1. A statement of philosophy referring specifically to to the statute should be set out;
2. Corporal punishment should be defined;
3. It should be determined if parental permission should be required;

4. Notice to parents should be considered;
5. Witness requirements, preferably by someone certified;
6. The type of instrumentality to be used;
7. The limits of punishment to be administered;
8. The requiring of reports to be filed;
9. Consideration of any insurance coverage which might be applicable to protect the person administering the punishment;
10. Clarification of the specifics of who, where, why how and what;

"One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, not withstanding the parents prohibitions or wishes."

This statement of the law shows the authority of the school to administer corporal punishment. It also exemplifies the limitations of that authority, i.e., the in loco parentis doctrine is limited to the purpose of the schools' existence: the student's education and the education of the group of which the student is a member. This essentially is the basis of corporal punishment as it exists today.

ADDENDUM TO CORPORAL PUNISHMENT CHAPTER BY LARRY FRENCH

Two recent Federal Court decisions have affirmed the holding that corporal punishment is not per se a violation of the cruel and unusual punishment clause of the 8th Amendment to the U.S. Constitution, as long as the punishment is reasonable and moderate. But both decisions have raised procedural due process issues as to the method of administering such punishment.

A Federal District Court in Virginia ruled the violation of procedural due process in spanking a 4th grade student without first telling him he could: (1) appeal a summary spanking sentence or (2) he could demand representation by an attorney. Although mentioning cruel and unusual punishment, the court narrowed its ruling to denial of due process, and awarded the plaintiff $200 in damages. The American Civil Liberties Union, representing the plaintiff pupil, claimed $30,000.00 in damages, contending "padding", whether reasonable or not, constituted cruel and unusual punishment.

Summary punishment generally means punishment administered without a hearing or the usual requirements of due process. The Virginian court has said that summary punishments gave the identical due process normally accorded more serious punishments such as expulsion or long-term suspensions.

The United States Supreme Court has refused in 1972 to review a corporal punishment case, but now has agreed to hear an Ohio case, hopefully to resolve the summary punishment issue. The Supreme Court will decide if due process hearing is necessary for a short-term suspension up to 10 days. This is normally regarded

as summary punishment.

More recently, in the 5th Circuit, in Ingraham v. Wright, 498 F.2d 248 (1974), stated "it is well settled that corporal punishment does not violate the 8th Amendment if the punishment is reasonable and proper."

This court went one step further and indicating the due process clause demands that the procedures followed by school officials administering corporal punishment comport with fundamental fairness. A student must know and understand the rule under which he is being punished. If he claims he did not know his conduct was prohibited, inquiry should be made to determine whether the student did know or should have known his conduct violated school rules. If the student claims innocence officials should make sufficient inquiries to make sure the student is guilty beyond any reasonable doubt.

The facts in Ingraham showed the corporal punishment in questions to be excessive in a constitutional sense or so degrading to the dignity of school children as to violate the 8th Amendment. It should be noted in Ingraham, junior high children, ranging in ages from 12 through 15 were involved while in the Virginia case elementary children were in issue. This would tend to give less descretion to school officials in the administering of corporal punishment when the students involved are in the secondary level of education. The demeaning or degrading aspect of corporal punishment obviously would have more impact with the older child, than with the child of elementary age.

As to the due process questions, any attempt to require an appeal right, prior to the administering of corporal punishment or a short term summary suspension would obviously circumvent the power and effectiveness of the board of education to administer proper discipline at the particular time as required. An improved method would be to institute a grievance procedure where the student or his parents could exercise a complaint to a higher official or board of education subsequent to the summary suspension or corporal punishment.

It makes sense that corporal punishment would be too late if a school official had to wait until appeal determinations. Some school systems today are asking the parent for their permission to administer corporal punishment, when necessary, assuming the reasonableness of such punishment. Certainly, any medical problems involved should be determined from the parents, but the parents should bear some burden to assure the school authorities are notified as to any particular medical complication that corporal punishment might aggravate. Some schools have completely banned corporal punishement at the secondary grade level.

Factors such as bussing one"s" and extracurricular activites, have somewhat limited the type of punishment administered. Obviously, each case should be handled on an individual basis and appropriate punishment given based on the type of violation. As indicated by Ingraham, the court said there was a "shocking disparity" between the offenses committed and the harsh punishment imposed by the school officials. Thus, the system of punishment not only violated the

constitutional prohibition against cruel and unusual punishment, but also violated due process. Accordingly, punishment should "fit the crime" ; but Ingraham finally makes it clear that such premise is to be the rule rather than the exception.

Chapter 8

THE POWERS TO SUE AND BE SUED

"What To do When Your Board is Sued"

Title 70 of the Oklahoma Statutes, Section 5-105 (49) designates every school district in Oklahoma as a corporate body with "the usual powers of a corporation for public purposes," including the capacity to sue and be sued. This section sets out the following style to be used in a petition in a suit against a school district: "Independent (or Dependent, if it is a dependent school district) School district Number _____ (such a number as may be designated by the county superintendent of schools) of _____ County, Oklahoma (the name of the county in which the district is located, or if lying in more than one county the name of the county whose county superintendent of schools has jurisdiction)." In reviewing a number of cases, this author notes there has been a variety of styles used in such suits, although the above style cited meets the statutory requirements. When a school board is sued, actually the district is a party to the suit, not the board. The board is only the governing body of said school district; therefore, it is not necessary to name the school board in the petition.

Common law has always upheld the power of a school district to sue or be sued, but such powers do not extend to actions of negligence. Normally, such powers are limited to suites against school districts as to the manner of acting within the scope of the districts' duties.

Although it is rare when a school district appears as a plaintiff in a particular piece of litigation, it has been suggested that school districts need be apprised of their rights which may be exercized before a court of law or before and administrative tribunal. Oftentimes, it might be more appropriate to pursue the matter as a complaining party rather than as the so-called answering party, or defendant. Typically, the school district is a defendant in a suit concerning actions taken or acquiescence by the local board of education.

Service in such actions against a school district may be perfected by serving the executive officer, or superintendent, of the school district pursuant to Title 70, Oklahoma Statutes, Section 5-106 (50). Service upon the superintendent is good service as to the school district. In the alternative, service upon the current elected President of the School Board would also satisfy service as to the school district.

The following is a presentation made by this author entitled "What To Do When Your Board is Sued."

"A lawsuit is not necessarily a pleasant experience, but can be a learning experience. Typically, when the summons is served upon a school district, "panic" sets in, and chaos and confusion results.

Once the summons has been served, it is too late to back-track and attempt to "patch up" old wounds. A case in point is where a Board of Trustees fired an institutional President for cause, but when challenged by a lawsuit for damages, attempted

to backtrack and gather evidence to support the dismissal. Predictably, the Court refused to consider any evidence that was discovered subsequent to the firing and the ex-president left Court with a substantial damage award.

While lecturing the speaking to various groups composed of educators and administrators, I continually stress the importance of the concept of "preventive litigation."

A system of "preventive litigation" is imperative as a much preferred alternative to "panic" when the Sheriff appears with service of summons.

Organizations such as the American Civil Liberties Union, the American Association of University Professors and numerous State Education Associations, have worked diligently and thoroughly the past few years and have accomplished much in succeeding to "put over" their ideas and philosophies to the Courts and to the Legislatures. School Board Organizations, although slow to leave the starting gate, are now beginning to regroup and fight for their particular rights, which are, in the final analysis, the rights of the communities of which the school boards serve.

Make no questions about it ... teachers, students and women today are increasingly more willing to challenge questionable practices by school authorities. Accordingly, each and every school board member and administrator must be prepared for the eventual onslaught. Let me assure you that no school board is immune from challenge. The practice of "preventive litigation" is a necessity.

"Preventive litigation" involves a few simple points:

1. The promulgation of a sound set of updated, reasonable, and relevant rules and regulations;
2. The preservation of all documentation in an orderly fashion, i.e. evaluations, reports, minutes, resolutions, etc;
3. Membership in an organization designed to further the interests of school board members and administrators with respect to the competent and efficient operation of the public schools;
4. Continued retention of an accountant and an attorney and other resource personnel necessary and competent in the field of school law.

School boards tend to become complacent and hesitate to earnestly work at "preventive litigation." As a school administrator once told me, "If we ever get sued, you'll sure be the first one we call." Now, is it not best to avoid being sued; or, at least, be fully and adequately prepared to defend the suit.

There is actually no way to prevent a suit being filed regardless of the extent to which a district has "done its' homework." Certainly, upon a reasonable investigation, a complaining party may well determine that litigation would be fruitless once discovering the facts and supporting documentation on file with the school district. School districts however, will continue to be sued, both in Federal and State Courts, and before certain administrative agencies. The "persuasiveness" though, as to removing the "guts" of a plaintiff's lawsuit must commence with a reasonable

and justified regulation on the books upon which the school board's action was based. For a school board to act without written authority is to most assuredly reduce the possibility of successful litigation from the board's viewpoint. Further, even though a regulation may be in existence, the application of same must be carefully evaluated in that it might have been utilized in a discriminatory manner and/or applied in a selective fashion.

Many lawsuits are threatened, but few are filed. If confronted with the possibility of a lawsuit, however, the board attorney should be immediately contacted and authorized to assume the leading role in communications. Do not wait until the damage is beyond repair and thereby expect your attorney to perform miracles.

Once a lawsuit has been filed and the school district served, all communication as to the subject matter of such lawsuit should cease on the part of school district officers and personnel, except at the specific direction of the school board attorney. In any lawsuit, initial efforts are conducted in an effort to resolve or settle the matter and thereby avoid an actual trial in a court of law. Such negotiation should be effected prior to the filing of the lawsuit; if unsuccessful, the chances of settlement subsequent to the filing are usually rare. A great deal of litigation can be avoided by merely providing a "forum" for those who have grievances of which they desire to state to the governing authority. If such a forum is not provided, then the grievance may well become grounds for a lawsuit.

If monetary allegations are involved in a lawsuit, then the case will be tried before a jury. If only equitable relief is being asked, then the Judge alone will hear the case and render a determination. Once the decision has been rendered within the initial stage of District Court jurisdiction, then appellate remedies become effective and appeals may be lodged by the losing party and procedures change. Legal issues are brought to the forefront and the appellate bodies are asked to review the initial decision as to its correctness based upon the facts introduced and the law applied. Accordingly, litigation may evolve over an extended period of time. Meanwhile, school business must proceed in an orderly fashion without direct cognizance of the pending legal proceedings.

Complications have arisen with respect to the "forum" by which a school district is sued. It is popular, when filing a lawsuit, to not only sue the duly elected board of education of a school district, its chief executive officer and applicable personnel, but also to sue each and all of them on an individual basis. It has been specifically ruled that in civil rights actions, a school district, because it is in the nature of a municipality, cannot be held liable for either damages or equitable relief; but the individual members thereof, can be so held and accordingly, their interests must be protected. Generally, most jurisdictions today authorize liability insurance to protect the individual members of the board as well as the individual members of the administrative staff. If such insurance is in force, the insurer will provide legal counsel for each insured to participate

in the proceedings along with the retained board attorney. It is important to assure that in the case of individuals being sued, as well as the district, that counsel be retained as to both interests, as oftentimes, such interests may be in conflict.

"Practical politics" is a concept which can be extremely important to the administrator who desires to remain outside the courtroom. His day-to-day dealings with parents, teachers, students and others constitute a criticial period whereby a great deal of subsequent conflict and possible Court action can possibly be avoided. An image of so-called "square dealing" and "critical concern" should be developed. If you make the dissident or litigant actually believe he has been dealt with fairly, he probably will not choose to go to court. This is actually what "due process" is all about. A little extra time and effort will in the long run, save you and your school consideration anquish, time and expense.

Consider the following statement which points out the important need for "practical politics":

> We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools.

All school district personnel should be required to attend legal briefings conducted by the school board attorney. The majority of incidents that occur upon school grounds directly involve the teacher. That teacher's action or inaction with respect to an incident occurring, is often the basis of a

subsequent lawsuit. Accordingly, it should be the administration's responsibility to assure that all teaching and staff personnel are adequately briefed as to the legality of their activities. Further, school board members should be briefed and adequately advised prior to effecting action as to any particular matter coming within their jurisdiction.

In conclusion, when your board has been sued, hopefully you have done your homework and are adequately prepared to defend said lawsuit in an effective and efficient manner. There is no way to prevent litigation, other than relying upon the doctrines of "preventive litigation" and "practical politics".

The courts prefer to leave the operation of the schools to the professionals who are trained to operate them. The ultimate authority for determining the validity and propriety of school administration actions, or non-actions, rests with the people of which the administraiton serves, and not the judiciary."

Chapter 9

THE POWER TO EMPLOY NURSES, COUNSELORS, LIBRARIANS, TEACHER AIDES AND STUDENT TEACHERS

"The Forgotten Employees"

A great many "professional educators "never" darken the classroom doors. Besides the typical "administrative" personnel such as superintendents and principals, consider those "other" certified employees who represent specialized talents within the school system. This chapter attempts to deal with these "forgotten" employees.

Title 70 of the Oklahoma Statutes, Section 5-117 (61) specifically empowers the local board to employ..." nurses... and other necessary employees of the district..."

Section 1-116 (16) not only defines the nurse but the student teacher as well. Student aides are not mentioned as certified employees but will be treated extensively in this chapter.

The Oklahoma School Code ignores mentioning librarians or school counselors. Instead, Section 5-117 (61) authorizes the acquisition of libraries and gives power to hire "other necessary employees of the district." With the absence of specific legislation, librarians and counselors are essentially treated as classroom teachers although their duties have no similarity to those of the classroom.

Consider problems relating to the content of books which many schools have faced in recent years. The school librarian has some responsibility as to what "kind" of books will be permitted

on the shelves. Accordingly, her selection should be guided by proper regulation and/or guidelines as to the type of reading materials which may be made available to the students.

When classified properly, both the librarian and the counselor seem to fall under the purview of management rather than labor because of their unique responsibilities.

Another area which needs definite guidelines is the role of a counselor. Since the counselor must maintain a confidential relationship with the students, he is precluded from disclosure to either parent, teacher, or administrator. This relationship is bundled in a right of certain privileges.

The establishment of the position of school nurse in a school district is perhaps one of the most progressive pieces of legislation passed by the legislature in recent years. Section 1-116 (16) of the Oklahoma School Code provides as follows:

> "A school nurse employed fulltime by a board of education shall be a registered nurse licensed by the Oklahoma State Board of Nurse Registration and Nursing Education, and certify the same as a teacher by the State Department of Education. Provided that any person who is employed as a fulltime nurse in any school district in Oklahoma, but who is not registered on the effective date of this Act, may continue to serve in the same capacity, however, such person shall, under rules and regulations adopted by the State Board of Education, attend classes in nursing and prepare to become registered."

In sub-paragraph 7 of Section 1-116 (16) the school nurse is accorded the same protection of laws and other benefits accorded a certified teacher, entitling a school nurse to all benefits, including tenure, sick leave, etc., as any certified teacher would se be qualified.

Because of a critical shortage of nursing personnel, a great majority of school districts are left without any personnel in the area of health and medicine.

Recently, proposed legislation, House Bill No. 1336, to provide for the employment of school health aides, failed in the Committee on Appropriations. The purpose of this legislation was to provide for adequate and competent medical assistance on a limited basis.

In some instances it could be severe if a teacher attempts to provide medical aid for the pupil and in doing so cause some additional injury. As noted in my book, "The School Administrator's Legal Handbook," a 1942 Pennsylvania case emphasized the severity of a personal judgment against a teacher who sought to treat a pupil's infected finger and in so doing, aggravated the infection, thereby permanently disfiguring the student's had.

The medication or first aid treatment is not necessarily included within the school district's power. Obviously, the school would have a common law duty to take any and all reasonable and necessary steps required normally for the health, safety and welfare of those of which it has temporary custody. In the area of medical treatment, however, the teacher and/or administrator is considered a lay person and administer such treatment at his own risk.

All schools should provide for a centralized dispensary staffed with a qualified nurse or at best, a person trained in first aid. The Pupil's medical record should be filed with the school and kept current. This is particularly important where a pupil requires

daily medication administered pursuant to a doctor's order. In this instance, a statement from both the parents and doctor should be required before the school acts to administer same. As to a student who is sick, the parent should be contacted immediately and under no circumstances should an ill pupil be sent to an unoccupied home. Custody should be transferred directly to the parent. Obviously, there is a severe need for additional health and/or medical personnel to assist the school system in the areas of illness and injury pertaining to a child.

It is imperative that a board of education render regulations relating to the administration of medicine upon school premises. This policy should be clearly outlined. For example, consider the following policy:

> "It is the policy of the_____ Public Schools that all childrens' medication be administered by a parent at home. Under exceptional circumstances, medication may be administered by school personnel under the appropriate administrative regulations."

Now consider the following as a regulation relative to the policy itself:

> "If under exceptional circumstances a child is required to take oral medication during school hours and the parent cannot be at school to administer the medication, only the school nurse or the administration's designee would administer the medication in compliance with the regulations that follow:
>
> 1. Written instruction signed by parent and physician will be required and will include:
>   (a) child's name
>   (b) name of medication
>   (c) purpose of medication
>   (d) time to be administered
>   (e) dosage
>   (f) possible side effects
>   (g) termination date for administering the medication (other oral medication, such as aspirin will not be administered to children under any circumstances by school personnel).

2. The school nurse will
   (a) inform appropriate school personnel of the medication
   (b) keep a record of the administration of medication
   (c) keep medication in a locked cabinet
   (d) retun unused medication to the parent only

3. The parents of the child must assume responsibility for informing the school nurse of any change in the child's health or change in medication.

4. The school district retains the discretion to reject requests for administration of medicine.

5. A copy of this regulation will be provided to parents upon their request for administration of medication in the schools.

Until such time as the supply of certified nursing personnel becomes more abundant, a school district will continue to have to suffer with the lack of qualified people in this area. The position of health aid would be of invaluable assistance until such time as a fully qualified registered nurse, either RN OR LPN can be employed. It is important to emphasize that any administering of medication and/or first aid should be on a restricted and limited basis and the school district should not be in the business of operating a doctor's office or hospital.

Precautions, however, must be taken in order to bridge the gap when the necessity arises. Under no circumstances should any classroom teacher or non-certified person employed by the school district administer any medicine or render first aid unless he or she is the designated administration person except in the most extreme of emergency situations.

During this last session of the Oklahoma Legislature, Senate Bill No. 521 was signed into law by the Governor providing that "the State Board of Education shall establish regulations

and prescribe the duties of teacher aides, including qualifictions for teacher aides, in public schools. Teacher aides may be employed to assist the classroom teacher, among other things, in performing hallroom duty, bus duty, playground duty, lunchroom duty and extracurricular activities involving school functions."
The emergency clause was included in the bill making it effective immediately.

The laws authorizing the use of teacher aides has been described as a "mess" and an invitation to legal troubles for school districts. After completing a study of the status of teacher aides in the 50 states, it was concluded by the "American School Board Journal" in its June, 1974 issue that the utilization of teacher aides may well cause litigation within any particular school district.

Obviously, teacher aides represent an important auxiliary arm for teachers. They frequently perform routine or menial tasks permitting teachers to devote more time to their speciality. instruction. Most aides are salaried, but Senate Bill No. 521 although initially providing an appropriation, was passed without a specific appropriation. Predictably, as the usage of the teacher aide increases, so will the duties, with the probable result that many aides will be moved from the mimeograph room to the classroom. With increased duties, there will be increased legal questions for the school boards and other education officials to consider.

Oklahoma does not certify teacher aides, but as indicated by Senate Bill 521, does statutorily recognize their status. The

State Department by regulations, states the following:

> "Under the provision of Title I of the Elementary and Secondary Education Act, Public Law 89-10 (ESEA), many school districts will employ aides to assist teachers in performing a variety of eligible services in the implementation of projects. There must be clearly defined responsibilities between the duties of the teacher who teaches and the teachers' aide who assits in performing mechanical tasks. The basis is that aides shall not be given the responsibility of instructing children, or keeping study halls."

The teacher aide has also been described as "a paraprofessional." The state of Pennsylvania, by way of rule and regulation, maintains a policy stipulating that when paraprofessionals are involved in damage or injury situations, these individuals may be personally liable for resulting cost that may be incurred. However, the paraprofessionals are liable only if they willingly neglected or ignored the advice or direction of a certified professional, or if they voluntarily discharged duties above and beyond those prescribed without the express knowledge or permission of the certified professional in charge. Specific examples from the Pennsylvania State Board of Education are as follows:

> "1. Whenever a certified professional knowingly permits a paraprofessional to perform duties for which the paraprofessional is not qualified... and injury or damages result, the certified professional may be held liable by virtue of neglect of supervisory responsibility.
>
> 2. Whenever a paraprofessional willingly neglects or ignores the advice or directions of the certified professional, or voluntarily discharges duties beyond the prescribed job responsibility without the express knowledge or permission of the certified professional in charge and damage or injury results, the paraprofessional may be held personally liable for such commission or omission.
>
> 3. If a certified professional who has been given

> administrative responsibility, displays unreasonable or imprudent judgment in the recruitment, employment, assignment or utilization of educational paraprofessionals, that professional may then be held liable by virtue of neglect of his supervisory and administrative responsibility."

South Dakota has also enacted similar guidelines and the states of Nevada, New Jersey, Maine, Wyoming have specifically charged local school boards with the responsibility for developing their own written policies governing the usage of paraprofessionals. No doubt this should be the intent of Oklahoma school districts with respect to the mandate of Senate Bill 521 if planning to hire a paraprofessional. Obviously, the certified employee should demand that his position, as well as the paraprofessional's position, be clarified relative to responsibility because it is obvious today that the classroom teacher has a sufficient burden within the nature of his job without unnecessarily having to be concerned with the performance of duties relative to the paraprofessional. The paraprofessional exists to assist the classroom teacher and at the same time assist the educational objectives of the school district; but when specific guidelines are not set up, this intent, which obviously is the intent of Senate Bill 521, will be defeated and school litigation would again be increased and infiltrated by new litigation involving the paraprofessional and the certified employee to which he is assigned.

Should a teacher aide maintain the same professional appearance outside the classroom as a certified teacher? Recently newspaper coverage indicated that a young teacher aide who posed nude for a national magazine was released from her duties. The aide insisted she had been fired while the superintendent claimed she had resigned. This situation raised the questions as to what is expected from a teacher aide outside the classroom. There are no asnwers to this question at this time.

The handling of student teachers is another problem. Typically, student teachers are utilized by school systems across the country, as well as in Oklahoma, under the close supervision of a supervisory teacher authorized by Section 1-116 (5). The student teacher obviously does some actual teaching and from time to time has sole responsibility over a particular class of students when the supervisory teacher is absent.

Normally a school district is vested with the power and discretion to utilize student teachers by virture of their powers in the management of the public schools. The student teachers are not actually employed, but as assigned to certain schools through cooperative methods as between the institution of high education and the local school district. The situation is a unique one and possibly an additional burden rests upon the school district to assure that responsibilities so assigned the student teacher is within the scope of authority dictated by statute and/or common law and that the supervisory teacher maintains responsibility as to the student teacher's conduct.

As in the case of hiring any employee or appointee, guidelines for conduct should be clearly outlined either by statute or by local rule or regulation. These guidelines will enable the district to fully use the student teachers, aides, and any other assistant to enhance the operation and management of the public school system.

The definition, classification, and clarification of position assignments within the school system is a necessary and critical function and one, which should be ranked as a high-priority item. A school system exists as a conglomeration of specialities and as such, proper trust must be accorded.

Chapter 10

THE POWER TO NEGOTIATE IN OKLAHOMA

"An Overview of "PN"

The Oklahoma Collective Bargaining Act, otherwise known as The Professional Negotiations Act, is found in Title 70 of the Oklahoma Statutes, Sections 509.1 509.10 (Sections 577 - 586 of the Oklahoma School Code). Passed by the Oklahoma Legislature in 1971, the act has been described as "a weak law at best" and not much more than a "meet and confer" law. Although simply written, its effectiveness depends totally upon how it is administered at the local level.

The purpose of the act is "to strengthen methods of administering employer-employee relations through the establishment of an orderly process of communications between school employees and the school district." See Section 509.1

The Oklahoma Negotiations Law can be classified into four simple steps: (1) designation of the bargaining representative; (2) drafting an approval of a procedural agreement; (3) negotiations itself; (4) acceptance and approval by the board of education.

Collective bargaining has been described and accurately so as an adversary procedure. Literally, no one sits in the middle. In examining "collective bargaining", two ideas are embodied. "Collective" suggests demands by responsible and authoritative representation, and presumes the democratic selection of such representatives by all those represented on both sides of the table. It further requires definition and rationalization of the bargaining group. "Bargaining" on the other hand, implies a commitment to peaceable informed and self-adjusting compromise of differences

within the limitations of practical possibility of all matters mutually important to the parties involved by the parties themselves. It offers in effect, the possibility for the incorporation of impartial outside directives should these prove necessary or desirable.

Conclusively then, collective bargaining is a procedure which is definite, formal, flexible and respectful of the varied interests involved. It is, by classic definition, mutually agreeable and contractually binding in nature. But it is neither amorphous nor untried.

Looking at the stated elements of the Oklahoma Professional Negotiations Act, each division appears to breed its own complications. Moreover, it seems more difficult, as time goes by, for the bargaining parties to actually reach the point where they are ready to sit at the table and negotiate those matters within the scope of negotiations.

Attitude, efficiency and effectiveness should play roles in "getting negotiations off the ground," so to speak. The term "reasonableness" should probably be overused when reaching decisions necessary to activate negotiations, since guidelines are not covered within the statutory edict of the collective bargaining act.

With respect to the selection of bargaining agents and keeping with the axiom of "you can't tell the players without a program," there must be determinations of bargaining agents and the groups they will be representing before proceedings can begin. Section 578 makes it mandatory on the board of education to recognize the

organization which secures authorizations signed by a majority of the professional educators within that particular district. What the law does not say is how that majority is determined - it also does not give standards as to the type of evidence which must be presented to the board so they can make their determinations.

Clearly, a procedure of soliciting authorization cards as dictated by Section 509.2 does not constitute an election. Further, as to the standing of the parties at the negotiation table, eac stands equally to the other and if one is permitted to solicit and in effect campaign for authorization cards, then that right might well be permitted for the other.

As far as actual verification of the authorization cards, a neutral third party procedure has been often suggested. Assuming the board of education can assure itself as to the actual number of cards so represented, a neutral third party count would be permissible.

Section 509.2 (578) is virtually silent as what method should be used in verifying the number of authorization cards so solicited by the professional organization. The problem has been handled in varied ways among Oklahoma school districts currently involved in the negotiations process.

Although Section 509.9 states there must be no discrimination, the teacher groups prefer that the local board of education not be presented the actual authorization cards for counting purposes, for fear of reprisal. On the other hand, the statute clearly indicates that the board of education is responsible to assure

that a majority of cards does in fact exist for no other reason than to protect those professional employees who do not so desire to be represented by any organization. Such is specifically indicated by the last sentence of Section 509.2 which states:

> "Any person who desires not to be represented by any organization, as provided for herein, may so state in writing to his board of education."

There exists varied differences of opinion as to who should represent the school board. Section 509.3 (579), in effect, permits anyone employed by the board to represent such board and further provides the employment of legal counsel for consultative purposes. This provision also applies to the professional organization involved. As a practical matter, a negotiation expert could be employed by the board.

Section 509.4 (580) simply defines "professional educators" as "certified public school teachers". Such definition includes administrators as well.

Title 70, Oklahoma Statutes, Section 509.5 (581) provides as follows:

> "All employees of a school district other than those employees who are professional educators shall likewise be eligible to designate an organization composed exclusively of such employees to represent them in negotiating and concluding an agreement with such school district on the terms and conditions of their employment. Such non-professional educator employees shall have the same rights and duties with respect to such matters as those conferred upon professional educators and professional organizations by this act. Any representatives for said organization shall be employed by the school district within the district, and no other person shall be authorized to represent said organization."

With the recent advent of school district support personnel

organizing for purposes of negotiations, it is critical now that boards of education and their representatives with all deliberate speed study the various problems involved with negotiating with non-certified personnel.

Personnel concerned will include, among others, secretaries, bus drivers, custodians and cafeteria workers. Such represents a unique situation, in that, although these personnel are as a group , non-certified , as opposed to those certified personnel who are commonly teachers within a school system, these support-type people, by virtue of their specific positions within the school system have special problems and circumstances relative to their work requirements. For example, a secretary's work requirement differs significantly from that of a bus driver. Obviously, secretaries may feel that they lack a community of interest with bus drivers and visa-versa. This feeling goes down the stream among cafeteria workers, custodians and other employees who are non-certified personnel.

Support personnel operate as an associate department of the Oklahoma Education Association, and school boards are now forced to recognize all non-certified or support personnel as that group covered by Section 509.5 (581) of the Professional Negotiations Act. Although the statute refers to support personnel as "non-professional" it has been advisable not to apply such term to the non-teaching employees. This term suggests invidious comparisons which may be resented by the non-teaching employees. Any non-teaching employees prefer to consider themselves actual professional,

whther or not they are certified. In fact, administrative officials should avoid anything that depicts of second class citizenship in negotiating with non-teaching employees. Remember that teachers are not the only group of employees who can shut down a school system as some districts unfortunately have learned the hard way.

Assuming only one contract will eventually be negotiated with support personnel, administrators will be faced with the difficulty of treating non-teachers less generously than teachers. For example, it would be difficult to allow teachers more leave time than is allowed other kinds of employees. Such a difference would be embarassing to support, either at the bargaining table or in the form of public opinion. Hence, in negotiating with teachers, the administration must consider the implications of a concession for other employees.

It is further desirable to have the same person responsible for negotiations with all groups. This may not be feasible where the line administrator for non-teaching personnel is a different person from the line administrator responsible for teaching personnel. All non-teaching employees may be administered through while the assistant superintendent for personnel may be responsible for teachers. However, even if each negotiating team has a different chief negotiator, which more than likely will be true as between teachers and non-teachers, there should be common representation on all management negotiation teams. At the minimum, there must be good communication between management personnel responsible for negotiating with both groups; otherwise, items negotiated in one contract may create difficulties in another.

In the long run administrators will find negotiating with non-teachers to be very similar to teacher negotiations. As we have already found in Oklahoma, there has already been established a tense rivalry as between organizing associations. Regardless, the best policy is to be as well prepared for negotiations with non-teaching or support employees as you hopefully are today for certified personnel.

The scope of negotiations is delineated in Section 509.6 (582) as follows:

> "The board of education and the representatives of the organization must negotiate in good faith on items effecting the performance of professional services."

In determining the outer limits for negotiation, recently the Kansas Supreme Court said the "...terms and conditions of professional service" means more than wages and hours, but something less that the boards' educational policies, involving a case by case assessment of an item's direct impact on "the well-being of the individual teacher". Apparently, if it is the latter, it is negotiable as opposed to that which has an "effect on the operation of the school system as a whole". Essentially "scope" should be determined at the bargaining table and should further be limited to employment and not policy factors.

Section 509.6 (558) further dictates that once recognition has been accomplished, a procedural agreement shall be completed within sixty (60) days. The statute does not require specific approval of either the organization or board, but does require that the "representatives" complete a working arrangement.

A procedural agreement is a "vehicle" which tends to involve both parties in an "exercise" situation leading to eventual table-negotiating. The tendency has been to "bog-down" as to procedural issues. The majority of specifics can easily be determined by the Chief Negotiators, therefore, each agreement should be general in its language, taking great care not to unnecessarily "bind" the board to a position it might later regret.

Basic provisions include the following 17 clauses. However, the procedural agreement is not necessarily limited to these clauses.

1. Agreement
2. Purpose
3. Reservation of Powers and Provisions of Law
4. Recognition Referral (optional)
5. Definitions
6. Compliance with laws
7. Anti-discrimination
8. Scope of Negotiations
9. Designation of Parties
10. Meetings
11. Good Faith
12. Negotiations Agreement
13. Budget Limitations
14. Impasse Procedures
15. Costs and Expenses
16. Greivance Procedures
17. Term and/or Amendment

A copy of a Model Procedural Agreement is printed following this chapter.

Myron Lieberman, negotiations expert, has said, "...the vast majority of procedural arrangements are not worth the paper they are printed on". Such premise represents the further theory that "experience dictates procedure" and until said times as a schcol district has experienced the negotiation proce[illegible] it shall not attempt to overly-bind itself to a procedural agreement.

Title 70, Oklahoma Statutes, Section 509.7 (583) provides

in part as follows:

> "A procedure for resolving impasses will be developed by the board of education and the representatives of the professional or non-professional organization; if agreement cannot be reached, the items causing the impasse shall be referred to a three member committee."

This particular section is labeled "Fact Finding Committee." The following procedures have been utilized by various states in resolving impasses: fact finding, voluntary arbitration, binding arbitration and mediation. Many procedural agreements reviewed indicate that certain options are included as to the procedures to be utilized in resolving an impasse. It appears, however, that fact finding is the sole and only procedure authorized by the Oklahoma Professional Negotiations Act. The provision indicates that a "procedure for resolving impasses will be developed" and goes on to say "if agreement cannot be reached."

The term "agreement" appears to refer to an item which has caused the impasse; therefore, the statute goes on to tell us that such items "shall be referred to a three member committee. This committee would serve as finders of fact. Accordingly, mediation or arbitration does not appear to be authorized by law in Oklahoma.

The development of a fact finding committee is not necessarily an easy task. By law, a third party will act as chairman. This third party is selected by agreement of the two other committee members chosen by each adversary. If the two cannot agree, the statute is silent in resolving the issue.

Some states provide for appointment by the District Court of the American Arbitration Association. Obviously, the third position

is a critical one in that likely, each advocate chosen by each party would be persuasive toward that particular party's position, and the third party would constitute the deciding vote. It appears then, that the statute limits selection as between the two appointed members. Accordingly, here follow some guidelines as to that particular selection:

1. Never select a party who is a resident and/or member of the community where the negotiation is occurring;

2. Do not choose any one associated with any teacher organization and/or board/administrator organization;

3. Do not choose any political official;

4. Attempt to choose someone from an occcupational area totally separate from that of the public school system. A professional arbitrator might be a possibility but as such, these are normally looked upon with great dismay amongst states involved in professional negotiations.

Obviously, the field is somewhat limited, but consider such professions as clergymen, attorneys and doctors. Professional educators at the higher educational level might be a possibility, but they may be involved in negotiations on their particular campus and would be persuaded as to their status, either as teacher or administrator.

Certainly all participants on the fact finding committee should be reimbursed their expenses and paid per diem, and all costs should be equally borne as between the two parties. The committee's job is an extensive one and much time and detailed work will be involved prior to the issuance of their recommendations.

Section 509.8 (584) prohibits "strikes" and provides penalties thereto.

Section 509.9 (585) is the anti-discrimination statute 1, which assures each professional educator the right to bargain without fear of oppression or reprisal.

Section 509.10 (586) is the "prior agreements" legislation which permits the continued validity of prior contractual arrangements not in conflict with the "PN" Act.

Considering local litigation as to Oklahoma's PN Act, there is little to report. Challenges as to the method of verification and as to the alternative methods to be utilized for "impasse" are pending in the courts at this time. Obviously, all parties are actively pursuing possible legislative amendments. One amendment exempting negotiation proposal session from the open meeting law, has failed (See Chapter 5 for the rough discussion). A lawsuit challenging Attorney General Opinion No. 72-233 (Sept. 29, 1972) is pending in court.

Additional Attorney General Opinion which has been issued interpreting the PN law held that a local board cannot recognize more than one professional organization to represent the professional educators of the district. That organization, the opinion said, must represent <u>all</u> the educators except those who have elected not to be so represented. (See Opinion No. 73-150, Feb. 13, 1974)

Another 1974 Attorney General Opinion held the bargaining respresentative of the educators must be elected by the educators of the district so represented, including those who are part-time,

seasonal, temporary or otherwise. (See Opinion No. 73-256, Feb. 8, 1974.)

Oklahoma is one of 34 states having statutes either imposing or authorizing some kind of bargaining obligation in the public sector. Such bargaining is not pursuant to an election, but rather, is pursuant to the verification of authorization cards. There are, however, obviously a number of states which do bargain in the clear absence of any statutory authorization for same. (See the procedure of Illinois, for example).

An interesting question is raised concerning the duration of the duty to bargain in the public sector. This duty usually involves proceeding at least to "impasse;" however, the "buck" does not stop there since most states, including Oklahoma, prescribe impasse resolution mechanisms, including mediation, fact finding, legislative hearings and voluntary or compulsory arbitration. It is this author's opinion, as earlier expressed, that Oklahoma only provides for fact finding, but throughout the state alternative methods have been used in resolving an impasse to reach an agreement. Since clearly Oklahoma does not have binding or compulsory arbitration, the duration of duty to bargain may well go into another bargaining year, creating additional problems. The idea of "good faith" bargaining tends to be the only remedy available in dealing with the duration under the state's Professional Negotiation Law.

In conclusion, I might quote a phrase to remember for those districts currently involved in bargaining propositions: "To compel bargaining is not to compel agreement."

MODEL PROCEDURAL AGREEMENT

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CLAUSES:

1. Agreement
2. Purpose
3. Reservation of Powers and Provisions of Law
4. Recognition Referral (optional)
5. Definitions
6. Compliance with laws
7. Anit-discrimination
8. Scope of Negotiations
9. Designation of Parties
10. Meetings
11. Good Faith
12. Negotiations Agreement
13. Budget Limitations
14. Impasse Procedures
15. Costs and Expenses
16. Greivance Procedures
17. Term and/or Amendment

INTRODUCTION

This Model Procedural Agreement is not intended to be a "panecea", but is intended to provide an outline/guideline to the Board who is initially entering into the negotiations process.

A "Procedural Agreement" is a "vehicle" which tends to involve both parties in an "exercise" situation leading to eventual table-negotiating. The tendency has been to "bog-down" as to procedural issues. The majority of specifics can easily be determined by the Chief Negotiators and thereby, each agreement should be general in its language, taking great care not to unnecessarily "bind" the board to a position it might later regret.

Title 70 Oklahoma Statutes §509.6 dictates that once recognition has been accomplished, a procedural agreement shall be completed within sixty (60) days. The statute does not require specific approval of either the Organization or Board, but does require that the "represenatives" complete a working arrangement.

Here follows some suggested "clauses" which normally are incorporated in a procedural agreement. Obviously, there are variations and alternatives that might be considered. Further, each "clause" could be re-worked to more accurately "fit" a particular situation. It is emphasized, however, that the following provisions are drafted intentionally in a broad and general fashion. Basically, the agreement should be feasible, simple and plausible.

Larry L. French
Negotiations Legal Consultant

AGREEMENT CLAUSE

This agreement is made and entered into this _____ day of _____, 19___, by and between the _____ Classroom Teacher's Association, hereinafter termed the "Organization" (or "Association") and The Board of Education of (In)dependent School District No. ____ of _____ County, Oklahoma, hereinafter termed the "Board"; and pursuant to Title 70 Oklahoma Statutes, Sections 509.1 - 509.10, the following items (articles, procedures, etc.) are hereby agreed upon by both parties:

comment: the "agreement" clause and the "purpose" clause can be combined into a "preamble" at the option of the Board. Always list the "organization" (or "association") first and the Board second. This indicates to the organization that they are being considered first, when in actuality, the Board always has the right of final approval.

PURPOSE CLAUSE

It is the purpose of this procedure to strengthen methods of administering employer-employee relations through the establishment of an orderly process of communications between school employees and the school district (see §509.1) and that the educational welfare of the children of the district is paramount in the operation of the schools and that the development and fulfillment of educational programs of the highest quality require professional working relationships as to all elements of the educational system, and in this sense, it is the intent of this agreement to promote maximum utilization of the specialized abilities, experience and judgment of the teaching profession and all parties sharing responsibility for the quality of instruction in this District.

comment: Section 509.1 sets out the purpose of negctiations and thereby should be included. Additional "objectives" can be included at the option of the Board.

RESERVATION OF POWERS AND PROVISIONS OF LAW CLAUSE

The Board is elected by the qualified electors of the school district as the governing body of the school district and as such, possesses all powers enumerated and/or delegated by the Oklahoma Constitution and the laws of the State of Oklahoma, together with the duties imposed thereby. Except as otherwise provided in this agreement, the Board has the sole and exclusive right and responsibility to exercise all functions and obligations of management. Accordingly, if any provision herein or application of said provisions herein shall be found to be contrary to law, such provision or application shall have effect only to the extent permitted by law and that all other provisions or applications of this agreement shall continue in full force and effect.

comment: this is a "must" clause which sets out the Board's continued "right of management" and refers specifically to legal restrictions thereto.

RECOGNATION REFERRAL

Pursuant to a Resolution adopted by the Board under date of _____19___, the Organization herein has been recognized as the representative for negotiations (see §509.2) and any bargaining representative so designated must had been elected by a majority of the professional educators of this district after proper notice of same has been provided, with the further stipulation that any person so employed as a professional, who desires not to be represented by any organization, may so state in writing to the Board and such is the responsibility of the Board to so assure all professional members have notice of same.

At any time during the course of the school year, either upon petition signed by at least (30%) of the total number of certified personnel or upon reasonable doubt as adopted by resolution of the Board, the submission of authorization cards will be required in order to substantiate any or all majority representation. Further details as to this submission shall be mutually agreed upon by the Chief Negotiators, utilizing a neutral third party, if necessary.

comment: Recognition itself should not be included in the agreement, but a referral to the resolution is permissible.

DEFINITIONS CLAUSE

A. "Board" shall mean the board of education of the school district.

B. "Superintendent" shall mean the superintendent of schools of the school district.

C. "Organization" ("Association") shall mean the majority group of certificated personnel referred to in §§509.2, 509.4.

D. "Bargaining Representative" shall mean the duly elected representatives of the "Organization" and the designated representatives of the "Board".

E. "Legal Consultant" shall mean legal counsel being retained by either party for consultative purposes.

F. "Professional Educators" shall mean certified public school teachers employed by the Board, §509.4.

comment: Do not attempt to define the "scope of negotiations". Elements requiring definition should be kept at a minimum.

COMPLIANCE WITH LAWS CLAUSE

The Board and the Oganization each agree to acknowledge and comply with those Federal and State statutes or ordinances which may be applicable herein or to subsequent agreements relating to provisions herein and as such, this agreement shall be governed and construed in accordance with the Oklahoma Constitution and the laws of the State of Oklahoma.

comment: this clause could be included in the "reservation of powers" clause, but does exist as a separate item which must be included in the agreement.

ANTI-DISCRIMINATION CLAUSE

No employee shall be discriminated against by the Board and/or its represenatives and/or by the Organization and/or its represenatives for his exercise or nonexercise of rights under Oklahoma's Professional Negotiations Act (70 O.S. §§509.1-509.10) see Section 509.9, nor shall either party discriminate against any person on the basis of race, creed, color, national origin, sex, marital status or membership or non-membership in any other organization, nor shall membership in any organization be required as a condition of employment.

comment: Section 509.9 provides the basis for this clause with the basic "race, creed, color, etc." provision included.

SCOPE OF NEGOTIATIONS CLAUSE

Negotiations shall consider only those items affecting the performance of professional services, (see §509.6, its terms and conditions.

comment: The Kansas Supreme Court has recently decided what is negotiable, the Court saying that "terms and conditions of professional service" means more than wages and hours being negotiable, but something less than the board's educational policies. Section 509.6 sets out this clause with "terms and conditions" included. Nothing more should be specified in the procedural agreement. The "scope" will tend to work itself out as the negotiations procede.

DESIGNATION OF PARTIES CLAUSE

At any time subsequent to the approval of this agreement, but no later than thirty (30) days hence,both the Organization and the Board will serve on each other a listing of not less than three (3), nor more than _____ persons to serve on their respective negotiating teams, specifically indicating each Chief Negotiator. Any subsequent changes must be indicated in writing and served upon the appropriate party. If at any time either party retains a legal consultant, such notice thereof shall be served upon the appropriate party. (§509.3)

comment: This clause "gets things going" after approval of the P.A. The number of "days" and number of team members would be at the option of the Board. Said clause also authorizes the usage of legal consultants pursuant to Section 509.3

MEETINGS CLAUSE

Upon receipt of service of negotiating teams by both parties, an organizational meeting will occur by mutual agreement of the Chief Negotiators, but no later than ten (10) days following the latter service, at which time subsequent meeting times, places and arrangements will be made, reduced to writing and a copy provided both the Organization and the Board. Each Chief Negotiator is responsible for designating assignments within his team, procuring the appropriate minutes of each meeting and submitting needed and appropriate documentation to the other negotiating team.

comment: This clause is designed to cover everything in the actual "meeting" area. A Board may desire to direct that meetings will occur at least so many times per month and/or per quarter, but such is generally not necessary. The Chief Negotiators can work all specific arrangements out to the satisfaction of both teams.

GOOD FAITH CLAUSE

Each party herein shall negotiate in good faith and further assure that a free and open exchange of views based upon mutual understanding, concern and cooperation occurs.

(see §509.6)

comment: This clause is based upon Section 509.6 and also includes the "flow of communication" edict.

NEGOTIATIONS AGREEMENT CLAUSE

When a substantive agreement is reached by both negotiation teams, it shall then be made in writing and submitted for consideration by the board. If so adopted, it shall be entered into the official minutes of the board and thereupon consitute a revision of school district policies.

comment: This provision constitutes the "final act" of negotiations procedurally. Obviously, "if not so adopted" re-negotiations would ensure until such time that the substantive agreement is adopted by the Board.

BUDGET LIMITATIONS CLAUSE

All provisions of the negotiations agreement are always subject to sufficient funds being made available to the Board in order to properly carry out the terms of said agreement. When and if it becomes known that sufficient funds will not in fact be available with which to finance certain ratified items, as well as meet the other requirements of the school district, the negotiating teams will meet and renegotiate those items within the framework of the amount of funds available and shall report back to the board prior to final adoption and filing of the school district budget for the ensueing year in accordance with Oklahoma law.

comment: a "must" in any P.A.

IMPASSE PROCEDURES CLAUSE

If agreement cannot be reached, all items causing the impasse shall be referred to a three-member committee. Said committee shall consist of one member selected by the Organization representatives, one member selected by the Board representatives and the third member selected by the first two members, and said third member shall act as Chairman of the Committee. After composition, said Committee shall conduct a fact finding hearing and shall adopt and issue procedural rules to all parties as to the conduction of said hearing. Within ten (10) days after said hearing, the Committee shall issue its findings and recommendations to both parties. The Committee's report shall be advisory only and shall not be binding on either party. (§509.7)

comment: Remembering that an impasse only occurs when negotiations have halted, or appear fruitless on every item and so long as you are negotiating on any item, you do not have an impasse, this clause follows the dictate of Section 509.7 which actually sets out a "fact-finding committee". Other methods such as mediation and binding arbitration would be optional although it is questionable as to whether Section 509.7 authorizes any other method other than fact-finding.

COSTS AND EXPENSES CLAUSE

All costs and expenses incurred by either party to this agreement shall be borne by that party and in the case of joint proceedings, each party shall equally share the cost and/or expense.

comment: The specifics can always be worked out by the Chief Negotiators. Oftentimes, excessive expenditures will work wonders in avoiding an impasse.

GREIVANCE PROCEDURES CLAUSE

An Optimum greivance procedure shall exist as a separate item of negotiation, each party remembering that communication channels should be clear and each position should be provided fair opportunity to present its case in an orderly atmosphere of respect for the other side and for the negotiations process.

comment: It is recommended that the actual greivance procedure not be included in the P.A. It clearly is a subject of negotiations and any attempt to pre-empt such an important procedure would prove to be a mistake.

TERM and/or AMENDMENT CLAUSE

This agreement shall be effective upon the signing by the President of the Organization and the President of the Board, and shall continue in effect until _____. Thereafter, the agreement shall be renewed automatically without modification for a one-year period unless either party shall request amendment.

If either party desires to change any provision of this agreement, such party shall notify the other not less than fifteen days nor more than thirty days prior to _____ of the year in which this agreement expires. Such notice shall specify in writing the changes desired. Upon such notice and no later than _____ of the year in which this agreement expires, the parties agree to enter into negotiations for modification. Negotiated modifications are final when ratified by the Organization and the Board. If either party elects to terminate this agreement, such party shall notify the other no less than thirty days nor more than sixty days prior to the renewal date of this agreement. By such action, the agreement shall for all purposes terminate as of the expiration date of the agreement.

comment: Initial negotiations should permit flexibility and after experience has been garnered, then firm up the committments, i.e. the P.A. This clause should cover all alternatives.